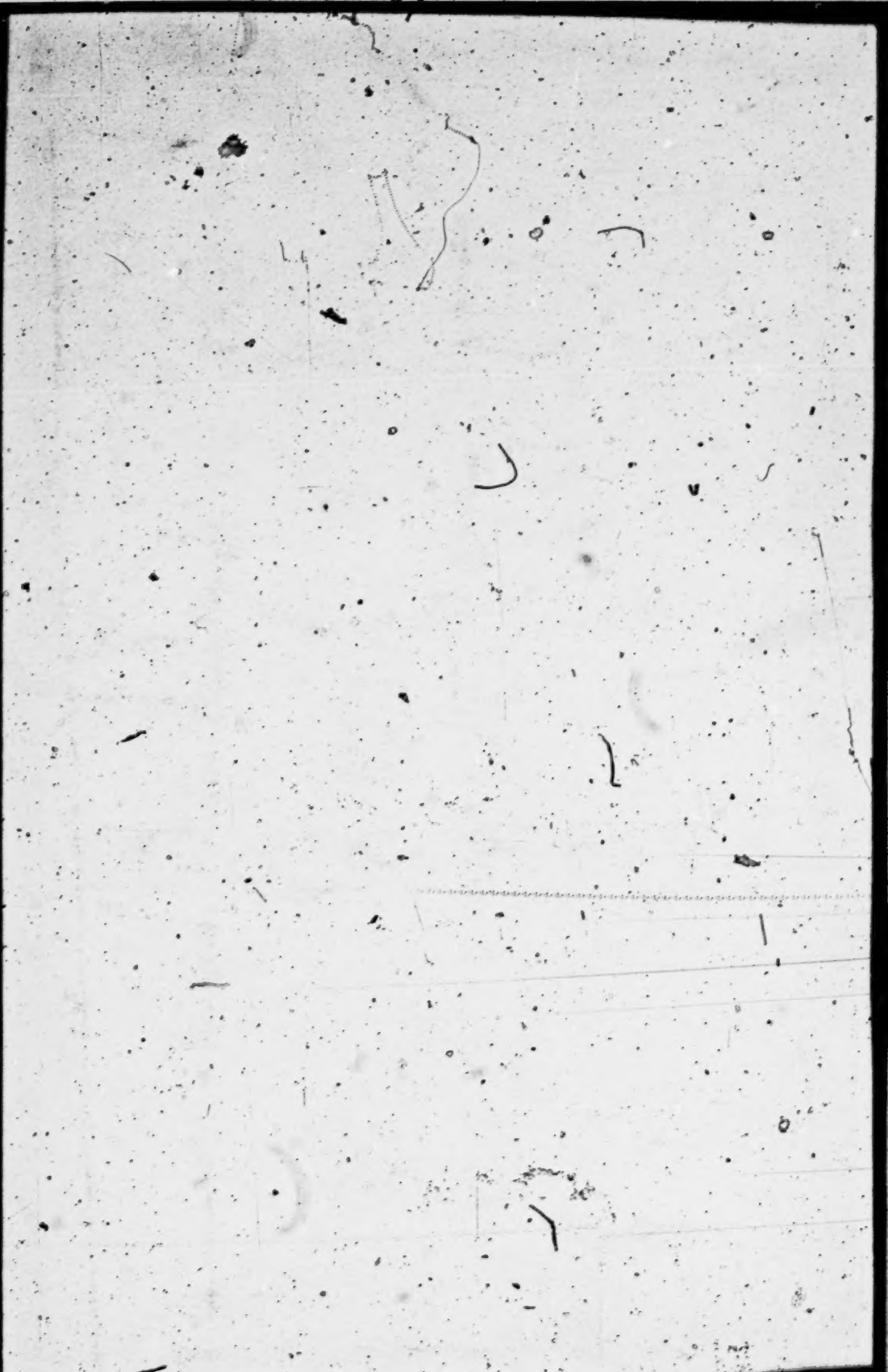

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted]49

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION, AND
HAZELTINE CORPORATION, A CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Zenith Radio Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on December 13, 1967, which reversed without remand two judgments entered in favor of petitioner and against respondents in the respective amounts of $19,042,173 and $15,919,458, on the ground that, as a matter of law, the facts proved did not show any so-called fact of damage.

CITATIONS TO OPINIONS BELOW.

The District Court rendered no formal opinion but did enter Findings of Fact and Conclusions of Law on the antitrust issues which are reported in 239 F. Supp. 51, 69.

A copy thereof fully annotated to the record is printed in Appendix B, hereto, *infra*, page 37.

The opinion of the Court of Appeals is as yet unpublished but is likewise printed in Appendix B *infra*, page 60.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 13, 1967 (Appendix B *infra*, page 86) but the opinion was not issued until December 19, 1967 (Appendix B *infra*, page 60). Petitioner filed a timely Petition for Rehearing or Reconsideration by the Court of Appeals *en banc* which was denied on January 23, 1968, with Judge Fairchild voting for rehearing *en banc* on the injunction issue (Appendix C *infra*, page 88). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. Whether a Court of Appeals is free to destroy the application of the antitrust laws in the protection of American foreign trade by reversing a finding of a District Court made on undisputed and conclusive evidence that "the foreign commerce of Zenith has been drastically curtailed by the patent Pools in England, Canada and Australia" on the ground that such pools, which admittedly refused to license pool patents for radio or television sets imported into Canada, England, and Australia, as a matter of law could cause no damage to Zenith Radio Corporation, the petitioner, as an exporter of radios and television sets.

2. Whether a Court of Appeals is free to hold, as a matter of law, that American companies such as Zenith, seeking to export electronic products to Canada, England, and Australia, cannot be injured in business or property within the meaning of Section 4 of the Clayton Act where

substantial and uncontested evidence in the record shows that Zenith's sales of electronic products were prevented or substantially curtailed in such foreign markets because the pools would not permit the licensing of foreign patents covering American products imported into Canada, England, and Australia and because of which practice Zenith could not protect its customers or distributors from the threat of patent infringement litigation in such foreign countries and the threat of confiscation of its products?

3. Whether a Court of Appeals is free to reverse a judgment granting injunctive relief on the ground that, as a matter of law, a patent pool, joined in by respondents and made up of competitors of Zenith, under which all of the competitors' patents are pooled and the competitors agree that such patents cannot be licensed in any manner that would permit the importation into Canada, England, and Australia of Zenith's electronic products, carries no threat of injury to Zenith's business within the meaning of Section 16 of the Clayton Act?

4. Whether a demand upon patent pools and their members for a patent license permitting importation of American-manufactured electronic products into foreign markets is a condition precedent to maintaining a treble damage action under the antitrust laws where, under the terms of the patent pool agreements, the pool members contractually pledge that no license permitting importation shall issue for electronic products manufactured in the United States which are covered by pool patents, and where the only license that can be granted under the pool agreements is a standard package license covering only local manufacture, use, and sale, and where the trial court has found on undisputed evidence that a pool license covering imported electronic products has never at any time been available?

5. Whether the uncontradicted testimony of Zenith's

officers, based on personal knowledge of business conditions and concerning the volume of business which Zenith would have done in Canada, England, and Australia absent the unlawful interference of the pools, constitutes substantial evidence within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure in support of the District Court's damage findings?

6. Whether the Court of Appeals by failing to accept the inferences drawn by the trial court from the evidence and to view the evidence in the light most favorable to petitioner usurped the function of the trial court as the trier of the facts contrary to Rule 52(a) of the Federal Rules of Civil Procedure?

7. Whether the Court of Appeals wrongfully departed from the accepted and usual course of judicial review in relying upon respondents' rejected post-trial offers of proof, which petitioner had no opportunity to meet, in order to set aside the findings of the District Court?

8. Whether a patentee misuses its patent monopoly where under threat of patent infringement suits brought pursuant to a conspiracy with foreign competitors of the prospective licensee, it seeks to force the prospective licensee to accept a territorial license limited to the United States which prevents the sale of patented apparatus abroad and requires the licensee to concede the validity of the inventions contained in the counterparts of such patents held and administered in foreign patent pools?

9. Whether a patentee misuses and unlawfully extends its patent monopoly where, under threat of patent infringement suits, it requires a prospective licensee either to accept unwanted patents under a package license covering 500 patents or to pay royalties under a formula whereby any one patent in the package will be licensed at 50%, any two at 80%, and any three or more at 100% of the package rate irrespective of the quality of any particular patent?

10. Whether under *Automatic Radio Mfg. Co.* v. *Hazeltine Research Inc.*, 339 U. S. 827 (1950) a patentee may compel a prospective licensee under threat of patent infringement suits to accept a license requiring payment of royalties based on the licensee's entire production of unpatented as well as patented apparatus, thereby destroying the incentive of the licensee to invent around the licensed patents?

11. Whether the Court of Appeals has the right to dismiss the cause as against Hazeltine Corporation by holding null and void a formal written pre-trial stipulation by the respondent Hazeltine Research, Inc. that for the purpose of this litigation Hazeltine Research, Inc. and its parent, Hazeltine Corporation, would be considered as one entity to avoid the necessity of proving the two corporations were one and the same, which stipulation was relied upon by the District Court and all counsel throughout the trial?

STATUTES INVOLVED.

The statutory provisions and Rule involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2; Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26; and Rule 52(a) of the Federal Rules of Civil Procedure.

The foregoing Statutes and Rule are printed in Appendix A *infra*, page 35.

STATEMENT OF THE CASE.

This suit was started by the Hazeltine Research, Inc. subsidiary of Hazeltine Corporation for alleged infringement of a patent adjudicated to be invalid by both the District Court and the Court of Appeals (R. 1).[1] It was stipulated that parent and subsidiary would be considered

1. "R." refers to pages in the printed appendix filed by Hazeltine and "Z. R." to pages in the additional printed appendix filed by Zenith in the Court below.

one and the same company for purposes of the litigation (R. 43). The petitioner, Zenith Radio Corporation, counterclaimed for treble damages and injunctive relief pursuant to Sections 4 and 16 of the Clayton Act (R. 48) and recovered two judgments against respondents, Hazeltine Research, Inc. and Hazeltine Corporation.

The first judgment entered on April 5, 1965 (R. 248) enjoined Hazeltine from adhering to any patent pool agreements which restricted Zenith from exporting electronic apparatus into any foreign market. It also awarded Zenith treble damages in the amount of $19,042,173 for loss of sales and profits in the Canadian market by reason of the activities of the CRPL Canadian patent pool.[2] The second judgment entered on December 13, 1965 (R. 4163) after further hearings in the cause awarded Zenith treble damages in the amount of $15,919,458 for loss of sales and profits in England and Australia by virtue of the activities of the patent pools in those countries in which pools Hazeltine had also joined and put its patents.

In entering the last judgment the trial court made the following comment (R. 4145-7):

> "There could be no question in my mind that Zenith suffered damages during the damage period by virtue of the pools, which I have found, and reiterate, existed at the time of the damage period."

The Court of Appeals reversed both judgments on the ground that there was no proof in the record that either the Canadian or English or Australian pools caused any damage to Zenith's radio and television business in those respective foreign markets.

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2. This amount included treble damages of $150,000 for expenses incurred by Zenith in defending against Hazeltine's patent infringement suit.

Proof of the Fact of Damage.

The proof of damage in the Canadian market occasioned by the Canadian patent pool was largely documentary and not denied by any witness. Zenith could not export its radio and television sets to Canada and sell them there without a license under the pool patents without exposing its products to confiscation and its distributors and dealers and customers to patent infringement suits (Def. Ex's 139, 140, 141-144; R. 3132, 3203, 3205, 3209, 3212-3214, 3215-3219).

A succinct description of the Canadian pool, its policies, and its effect on the business of companies such as Zenith, was written by a Canadian Royal Commission investigating the pool. The report, published December 31, 1959, describes the pool and its activities as it existed at a time within the instant damage period (R. 2143, 2160) as follows (Pl. Ex. 50A; R. 2161, 2162):

> "Canadian Radio Patents Limited (hereinafter called CRPL) was incorporated in 1926 for the purpose of acting as a patent licensing agency. At the time of the presentation of its brief to this Commission it acted as the central patent licensing agency in the administration of patent rights in the radio, television and general electronic fields in respect of patents owned by its then five shareholders: Canadian General Electric Company, Canadian Westinghouse Company, Northern Electric Company, Canadian Marconi Company, and Canadian Radio Manufacturing Company.
>
> "It also acted as licensing agent in Canada for RCA Victor Company *and Hazeltine Electronics Corporation.* * * *
>
> "The portfolio in respect of which CRPL had the right to grant licenses consisted of 5,000 patents, and *in the absence of a license from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver.*
>
> "CRPL indicated that it does not grant a license

to any importer of radio or television receivers, except in the limited situation where the type or kind of radio or television receiver sought to be imported is not manufactured by any radio or television receiver manufacturer in Canada. It is particularly in respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission.

"It was stated to be the policy of CRPL to enforce its patent rights against any person who sells in Canada an imported radio or television receiver which infringes any one or more of the patents in its portfolio . . . ." (Italics ours.)

This document was put in evidence without any qualification whatever by the respondents Hazeltine but is not even mentioned in the Court of Appeals' opinion.

A witness called and sponsored by Hazeltine was cross-examined on the document and testified (R. 1626) that the statement in the report that "in the absence of a license from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver" was carefully considered before being written by the Royal Commission (R. 1626). The witness was counsel for CRPL and an advisor for the Commission (R. 1611-1612). The witness also admitted that the importation into Canada of radio and television sets would "certainly" constitute competition for the members of the pool (R. 1623, 1627) and that the refusal to license such importation would stop such competition (R. 1627). He also admitted that this policy of the pool stopped foreign competitors from the United States from selling electronic products in Canada and that this included Zenith (R. 1627). This testimony alone constitutes substantial evidence in support of the trial court's finding that:

"The foreign commerce of Zenith has been drastically curtailed by the patent pools in England, Canada and Australia." (Finding XXXVI; R. 122)

Further, the testimony of Zenith's officers that Zenith was damaged during the damage period by the pools was not denied. Samuel Kaplan, Executive Vice President and Treasurer of Zenith, an expert in the radio and television business with over 40 years' experience with Zenith's products (R. 1445), testified that he was thoroughly familiar with business problems and sales potentials in the Canadian market (R. 1447) and that he had made a careful survey of the Canadian market in order to determine whether it was more advantageous to manufacture in Chicago and export to Canada (R. 1447). He had also attempted to determine how much business Zenith lost as a result of the Canadian conspiracy during four years preceding filing of the counterclaim, which was the period from June, 1959 through May, 1963. He testified that he took into account all relevant factors such as tariffs, shipping costs, distances, and the nature of the market (R. 1450, 1451) and the competitive potential of Zenith's products, which, he testified, were famous for quality and commanded a premium price wherever sold (R. 1462).

He testified that with respect to Canada, if the market had been free from the activities of the pool and if Zenith had therefore been free to develop the market (R. 1450), Zenith would have had the same share as it did of the United States market, or 20% instead of 5% (R. 1451).

Joseph Wright, the President of Zenith, gave evidence to the same effect (R. 1373-1379) and testified that free of the pool's restrictions, Zenith could and would have obtained the same share of the Canadian market as it did of the American market (R. 1379, 1380).

Neither witness was contradicted in any way and their testimony stands without denial on this record.

Petitioner's Exhibits 218 and 220 show that given the same share of the Canadian market as it enjoyed in the United States during the damage period, Zenith would have

earned profits of $5,826,896 in television and $470,495 in radio over what it did make in the restricted Canadian market (R. 1439, 1440; Def. Ex. 218, 220; Z. R. 611, 655).

Since the Canadian market had been subject to the activities of the pool ever since CRPL was organized in 1926 (R. 2161), there never was any open market comparison available in Canada. The only measure of damages available was a comparison between Zenith's activities against comparable competition in the American market with its results just across the border in Canada, where the restrictions of the pool prevailed. This evidence was offered and received by the trial court under the principle enunciated by this Court in the *Bigelow* case (327 U. S. 251, 264-5).

The damage exhibits compared Zenith's operation and profits against the comparable competition in the two markets, which markets themselves were shown to be comparable except for the restrictions of the pool (R. 1450-1). Since the pool had destroyed any open market comparison in Canada, this was the best and only evidence of damage available.

In its Petition for Rehearing Zenith represented to the Court of Appeals that it was prepared to show that after the injunction was entered in the District Court, Zenith's television business increased to a point representing 18% of the Canadian color TV market, which was approximately the same share Zenith enjoyed in the American market. In 1967, under the protection of the injunction, Zenith's Canadian sales of color television sets, on which Hazeltine claims to hold the dominating patents, amounted to $12,260,000, being an increase for Zenith of 66% as against an industry increase of approximately 21%. This actual sales experience corroborates completely the testimony of Wright and Kaplan that, free of the restrictions of the pool (stopped by the District Court injunction), Zenith would do as well marketwise in Canada as it did in the United States.

In finding as a matter of law that no fact of damage was shown in Canada, the Court of Appeals cavalierly dismissed evidence of a settlement in an earlier suit involving the same Canadian patent pool. That evidence which was introduced by respondents themselves, showed that Western Electric, RCA, and General Electric, as members of the Canadian pool, had paid Zenith ten million dollars for damages which they had caused Zenith in Canada up to October, 1957 (Pl. Ex.'s 39-43, 48; R. 2079-2131). These co-conspirators of respondents were Zenith's competitors in Canada and had operated the Canadian patent pool since 1926 and were familiar with every facet of the pool's activities and its effect on a competitor's business. The RCA case damage settlement was on account of the same pool activity as was shown to have continued in the present case. The Court of Appeals holds as a matter of law that this evidence has no relevance in determining the impact of such a patent pool upon Zenith's market for television and radio sets in Canada even though respondents contended that the settlement released Hazeltine as a co-conspirator for damages which Zenith suffered after the settlement date (R. 224-6).

The court below has further reached the amazing conclusion that the fact of damage in an antitrust case cannot be proved by the admissions of the co-conspirators themselves made in the course of their conspiracy, where by the settlement of a lawsuit they were seeking to dispose of an attack on the pool and to preserve intact the very pool complained of here, and where the evidence was introduced by the respondents themselves without any qualification whatever.

In holding that the Canadian pool, as a matter of law, could have no impact on Zenith's business during the damage period, the Court of Appeals ignored all the evidence of what occurred after the ten million dollar settlement.

The record shows that Zenith mistakenly thought that by this settlement its troubles with the pool had ended and it started to export radio and television receivers to Canada through its Canadian hearing aid distributor, Zenith Radio Corporation of Canada (R. 1372, 1378). As soon as Zenith started distribution (Def. Ex. 152, R. 3259), Brian McConnell, Manager of the CRPL pool, called on Zenith's hearing aid subsidiary in Toronto, and on July 30, 1958 demanded that Lloyd Kiely, Zenith's General Manager, advise him whether or not Zenith intended to sell imported sets in Canada. Specifically, McConnell informed Kiely that even though patent licenses covering imports had been obtained from RCA, General Electric, and Western Electric as a result of the RCA-Zenith litigation, the pool had many other patents and no licenses permitting import would be granted by the pool (R. 3259-60). McConnell requested a circuit diagram of the Zenith receivers which were being imported, which he said would be turned over for examination by "CRPL principals", and in the event any infringement was found, a further meeting "to discuss the problem" would be arranged (Def. Ex. 151, 152, R. 3256-3260).

In September, 1958 it came to Zenith's attention that a warning notice (Def. Ex. 138, R. 3121-2) was again appearing in a trade publication that was sent to the entire Canadian electronics industry. It was a repetition of the warning notices which the pool had regularly circulated in the trade for over 30 years (Def. Ex. 130-137; R. 3103-3119). It provided (Def. Ex. 138, R. 3122):

> "Notice. To Importers, Vendors or Users of Radio and Television Receivers and Other Electronic Equipment:
>
> "Canadian Radio Patents Limited is a central patent licensing agency administering various important Canadian patents of invention relating to radio and television receivers and other electronic equipment."

It then recited a number of companies which were licensed by the pool, stating that Canadian Radio Patents Limited had licensed "the following Canadian companies for the manufacture and sale in Canada of radio and television receivers and other electronic equipment embodying inventions which it administers." The list of companies excluded Zenith. The notice then went on to say:

> "The above companies are working the patented inventions in Canada on a commercial scale and are prepared and willing to meet the public demand for the patented articles in Canada on reasonable terms.
>
> "Canadian Radio Patents Limited desires to inform importers, vendors, purchasers or users of radio and television receivers and other electronic devices and equipment incorporating patented inventions owned or administered by Canadian Radio Patents Limited and not manufactured or sold under license from Canadian Radio Patents Limited that they will be held liable for patent infringement."

The Court of Appeals held that the regular circulation of such warning notices, even though they sought by threat to maintain a boycott of any importer's products nationwide throughout Canada, could not as a matter of law be used as proof of the fact of damage because, "There was no showing that the 1958 advertisement had any adverse effect on Zenith's sales". In other words, in the absence of specific damage proofs assignable to this warning notice, it could not constitute proof of the fact of damage. Obviously, the notice threatened infringement suits against Zenith's possible and prospective distributors, dealers, and customers if they handled or bought Zenith's unlicensed sets. The Court of Appeals thus holds that a threat to sue Zenith's customers as a matter of law cannot be a damage causing overt act pursuant to the conspiracy.

Joseph Wright, President of Zenith, wired to McConnell demanding that this attack on Zenith's products in Canada

cease (Def. Ex. 138, R. 3121). Wright's wire had no effect. On September 16, 1958 McConnell wrote Wright, referring to his earlier discussion with Kiely in which he said no license would be granted by the pool except for manufacture in Canada which would require building a factory in Canada. McConnell again asserted that Zenith was "using inventions covered by patents which we administer and under which we are informed you are not licensed" (R. 3123).

On September 23, 1958 Wright again wrote McConnell in reply, stating (R. 3124):

> "You . . . must be well aware that the activities of Canadian Radio Patents Limited in stopping our Canadian business in past years was at the very heart of the substantial claim for damages which was settled at the same time the licenses were granted."

Wright's September 23 letter was not even answered (R. 1371).

Thereafter, in a conference with Zenith's Vice President, Frank Crotty, on May 12, 1959 (R. 3263) McConnell told Crotty that Zenith was infringing some of the pool patents, "*one of which was a patent of Hazeltine origin.* He told me that I would have to take a license; that the license could not be for importation, it would have to be for local manufacture" (R. 1332). This conversation was not denied. Following the May, 1959 meeting, McConnell wrote Crotty on June 5, 1959, enclosing the pool's standard license forbidding importation and giving notice of infringement of a CRPL patent (Def. Ex. 154, R. 3263). McConnell advised:

> "With regard to the patent and its use in Zenith television receiver No. B-2225, I have had this matter reinvestigated and there is no doubt in our minds that the invention covered by the patent is used in this receiver. The tests show this quite conclusively."

Following this the instant suit was filed in November, 1959 on a Hazeltine patent whose counterpart was included in the Canadian patent pool (R. 1192-1196, 1311, 1332). This was conceded in open court (R. 1051). The trial court found (R. 118, Finding XXV):

> "... Since 1943 Hazeltine has been an active participant in the activities of the Pool and has been receiving a substantial share of its profits. The Hazeltine patents go into the Pool pursuant to an exclusive license agreement between Hazeltine and Canadian Radio Patents Limited which grants to the Pool the right to include Hazeltine's Canadian patents, present and future, in its licensing and litigation activities. This arrangement has been extended to a date beyond the filing of the instant counterclaim."

This Finding was not in any way disturbed by the Court of Appeals' decision.

It was conceded at the trial by Hazeltine's counsel that this pool constituted a violation of the anti-trust laws. The following colloquy between the Court and counsel occurred (R. 1323):

> "The Court: Is it your position, Mr. Dodds, that a conspiracy to prevent the importation of American radio and television sets is not a violation of the Sherman Act?
>
> "Mr. Dodds: Oh, no, if there is a conspiracy, no, I would agree that would be a violation."

This concession was required by the decisions of this Court. *United States* v. *National Lead Co.*, 332 U. S. 319 (1947); *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951).

Nevertheless, the Court of Appeals holds as a matter of law that nothing happened during the damage period that could possibly injure Zenith's business even though it was conceded that the pool remained in operation during the entire damage period, and even though it was alleged and proved, and the trial court found, that the instant suit

was brought in furtherance of the conspiracy. Thus, the counterclaim filed May 22, 1963, alleged (R. 51-2):

> "The filing of this suit and the threats to file other infringement suits against counterclaimant on any number of patents in the Hazeltine pool were acts employed to effectuate the conspiracy alleged herein and to compel by economic coercion the signing of counter-defendant's package license. In turn, either the signing of the license or a finding of validity and infringement in this suit will signal and lend overwhelming support to attacks on counterclaimant's export trade by the foreign pools under foreign patents covering the same inventions. * * *
>
> ". . . Because of the pendency of this suit and counter defendant's other charges of infringement described in paragraph 7 above, counterdefendant has been forced to delay expansion of its foreign trade in England, Canada, Australia and other countries where, in furtherance of the conspiracy alleged herein, counterdefendant's inventions and patents are employed to restrain and prevent importation and trade."

The trial court determined this issue along with all other antitrust issues in the case in favor of Zenith, as follows (R. 128):

> "The Court has reviewed the evidence, exhibits and briefs of the parties on both the patent and anti-trust phases of the above cause and finds for the defendant on the issues raised by the complaint and answer and the counterclaim."

That the trial court's ruling was correct is shown by the opening statement of Mr. Dodds, counsel for Hazeltine (R. 1052):

> "Mr. McConnell speaks repeatedly about these pools keeping out sets. These pools don't have any power to keep out anything. They are not a government body. All it means is that if you import goods into Great Britain or Canada or Australia, and if what you are importing are infringements of the patents they

administer, you may subject yourself to an infringement suit, the same as if they infringe a patent in this country. *And we can't prevent Zenith from selling sets without an adjudication, which we are in the process of trying to get now.*" (Italics ours.)

This was a clear admission that Hazeltine was trying to get an adjudication of an infringement of a patent held by the pool which could be used by the Canadian pool in a suit on the Canadian counterpart. The Canadian courts recognize the validity of Canadian patents where their American counterparts have been upheld in American courts. *American Arch Co.* v. *Canuck Supply Co., Ltd.*, 3 Dominion Law Reports 567; *Nu-Tec, Ltd.* v. *Hearst*, 38 Ontario Weekly Notes 2; *The Queen* v. *Castro*, 5 R. S. Q. B. D. 490, 517. In *Nu-Tec* the Court said (p. 3):

> "The effect of the judgment in the [United States] Federal Court is to establish the patentability of the device so far as the authority of a trial judge of that court can establish it, and that authority ought to be followed . . ."

It is therefore readily apparent that if Hazeltine had won the patent issue in the instant case or if it can sustain any of the nine color patents currently being asserted against Zenith (R. 1341, 51, 43), that result would furnish the Canadian pool with the means to kill Zenith's business in Canada by subjecting all of its products to forfeiture and its distributors and customers to damage suits, or in other words, would furnish the means to stop entirely Zenith's export trade with Canada (R. 1380).

Under the decisions of this Court referred to *infra* at pages 30-2, the trial court was free to draw the inference that Hazeltine, a member of the conspiracy, was acting pursuant to the conspiracy in bringing the instant suit and was therefore directly responsible for the resulting curtailment of Zenith's business; testified to by both Wright and Kaplan.

The inference was buttressed and corroborated by the terms of the standard license tendered Zenith by the respondents. It provided:

> "Section 3. Nothing herein contained, and no act or acts hereunder, shall be construed as, or result in, conveying any license to Licensee, expressly or by implication, estoppel or otherwise . . . (b) Under any patents of countries foreign to the United States." (Def. Ex. 2; R. 2206, 2207)

This provision was an essential part of the conspiracy because it specifically prevented the application of court decisions holding that the grant of a domestic license also grants a license by implication to the foreign counterpart patent (*Curtiss Aeroplane & M. Corp.* v. *United Aircraft E. Corp.*, 266 Fed. 71, 77-8 (C. A. 2, 1920)) which would bring respondents in violation of their agreements with their foreign conspirators not to license except through the pools.

This was conceded in a letter written by Dodds, where he stated:

> "In those countries where the Hazeltine patents are included in an industry-wide pool they are, of course, beyond our control and our licensees have to make their own arrangements with such pool." (Def. Ex. 115; R. 2876-7)

The instant suit was brought on one monochrome patent but Hazeltine asserted that Zenith was infringing at least four such patents (R. 1357). The alternative to a standard package license on monochrome patents which Hazeltine offered was a license under which any one patent in the package would be licensed at 50 per cent, any two at 80 per cent, and any three or more at 100 per cent of the package rate (R. 1358-9). This formula license like all others required payment of royalties on Zenith's entire production whether licensed patents were used or not (R. 1358-9).

Subsequent to the instant suit, Hazeltine, on October 18, 1961, also asserted nine color television patents against Zenith (R. 1341). The counterparts of these patents were also in the Canadian pool and were licensed in Canada only for Canadian manufacturers (R. 1051, 1066, 2887-90, 2914).

The dilemma the assertion of these television patents placed Zenith in was obvious. If it took a package license under Hazeltine's domestic patents, it thereby admitted the validity of all the foreign counterparts in the pool and lost any defense to an infringement suit on the patents regardless of whether the patents were valid or not. Further, since it could obtain no license in Canada unless it manufactured the sets in Canada, Zenith had of necessity to curtail its operations in Canada until the outcome of the instant suit could be determined (R. 1412).

The trial court on this evidence not only held the assertion of the patents to be pursuant to the conspiracy, but properly held that putting the patents in the pools under the circumstances in this case was a violation of the antitrust laws.

The Court of Appeals makes no effort to deal with the basic facts from which the trial court was permitted to draw inferences but disposes of the issues with the curt remark not supported by anything in the record and contradicted by what we have set forth above, that:

> "There is nothing in the record to show that this suit had any effect to damage Zenith's Canadian business. The record shows that this claim was not taken seriously by the district court."

The Court of Appeals, while conceding that a conspiracy existed in both England and Australia, disposes of both markets by saying that there was no evidence that Zenith was prepared to enter the English or Australian markets. This ignores the fact that Zenith had a distributor in England (R. 1385-6) and sold sets readily adaptable to

English specifications (R. 1452-3, 1465-7), and that Zenith tried but was unable to interest Australian distributors in handling unlicensed apparatus (R. 1398; Def. Ex. 215, R. 3767-3832B). It also ignores the fact that commercial importation into both the English and Australian markets was blocked by boycotting agreements covering the entire markets. In England each of the participating companies in the pool, including Hazeltine (R. 2494), contracted that during the term of these agreements:

> "Unless otherwise agreed no licenses are hereby agreed to be granted to import Radio Apparatus [defined to include television] into the United Kingdom or to deal in in the United Kingdom imported Radio Apparatus or Radio Apparatus containing imported component parts to an extent exceeding in value 10 per cent of the retail list price of such Radio Apparatus except in each case samples and experimental models for the use of the parties hereto." (Def. Ex. 58; R. 2501)

It was further provided that any licensee under the pool agreed "not without the previous written consent of the Grantors to sell within the said territory any Television Receiver which has not been manufactured in the territory for which this License is granted" (Def. Ex. 69; R. 2615).

The record shows that Hazeltine patents and rights, existent and future, have gone into the Australian pool for over 35 years (Def. Ex's. 188-195; R. 3625-3719). During all this time they have been licensed in such a way as to preclude and exclude any imports of radio or television sets into Australia (Def. Ex. 197; R. 3727), and the pool has never in its history granted a license to import American sets into Australia (Def. Ex's. 188-195; R. 3625-3719).

The Court of Appeals refers to the claim that the Zenith set was not adapted to receiving scanning signals of 405 lines and that Zenith was not prepared to enter the English market until after the English standard changed to 625 lines

which was after the damage period. This contention came from Hazeltine's rejected offers of proof (R. 156-160) made after the case was decided in an effort to meet the contrary evidence in the trial record (R. 1452-3, 1466-7).

While concluding in the case of England and Australia that Zenith was not damaged because it did not manifest interest in the markets by shipping sets on a commercial scale, the Court of Appeals paradoxically holds, in the face of uncontradicted testimony of Wright and Kaplan to the contrary (R. 1373-80, 1447-51) and the trial court's findings of fact (Finding XXXVI; R. 122), that there was no diminution of Zenith's foreign trade in Canada because it sold several thousands of radio and television sets and "Zenith's subsidiary in Canada has not been sued or threatened with suit for importing radios into Canada since 1957."[3]

We have already pointed out that pool manager McConnell, within the damage period, notified Zenith of infringement and demanded that Zenith accept a license prohibiting importation, after which Zenith was sued in the instant case on the domestic counterpart of a patent in the Canadian pool.

No defense whatever by testimony or documents was ever offered to the damage proofs in the instant case and the case stands in the posture of a demurrer to the petitioner's evidence.

The Injunction.

Having reversed the District Court's findings on the "fact of damage," the Court of Appeals proceeds to hold

3. The Court of Appeals chides Zenith for not having called a Canadian distributor as a witness, but under applicable decisions of this Court the burden of calling such witnesses was on the respondents. *Interstate Circuit* v. *United States*, 306 U. S. 208, 225-6 (1939). The record shows that the distributors in Canada were parties to the conspiracy (Def. Ex. 141, R. 3204-6) and the respondents did not dare call them as witnesses and subject them to cross-examination in the instant case.

without any further discussion that therefore Zenith is not entitled to injunctiv relief from the foreign patent pools. The opinion states:

> "It follows from our conclusion with respect to the foreign patent pools that injunctive relief against 'threatened loss or damage' directed at those pools, alleged by Zenith to be unlawful conspiracies, cannot be justified under 15 U. S. C. Sec. 26. Paragraph C of the injunction granted must be stricken."

The Court holding on this issue assumed that Zenith had to show infringement suits by the pool during the damage period even though the very existence of the pool was a threat to Zenith's business, and even though McConnell, the Manager of the Canadian pool, threatened such action during the damage period (Def. Ex. 154; R. 3263).

Although the District Court found on substantial evidence in the record that Zenith's foreign commerce had been "drastically curtailed," petitioner would have been entitled to injunctive relief even if no injury or damage had been shown. In the instant case the District Court's finding that the foreign patent pools constituted illegal conspiracies in violation of the antitrust laws was supported by overwhelming documentary evidence and admissions and was not contested by the respondents in the Court of Appeals. That Court has not disturbed the conspiracy findings. The gist of the Court of Appeals' decision is that, as a matter of law, a foreign patent pool formed for the express purpose of stopping the import of American products poses no threat to an American exporter such as Zenith, and therefore the Federal antitrust laws afford neither Zenith nor any other American exporter any protection.

In the instant case the respondents are members of the pools and the pools have exclusive licensing rights with respect to respondents' foreign patents. The pool port-

folio of patents includes virtually all the important patents in the television field, including Hazeltine's color patents (R. 1248, 1066, 2890, 2500, 3711). As pointed out the only license the pools will grant is for local manufacture and no license to import has ever been granted, and the trial court so found. At the same time, Hazeltine refuses to grant a license under its patents to export to any country where Hazeltine is a member of a pool (Def. Ex. 115; R. 2876-7). The Court of Appeals' decision reverses the trial court's finding that these conspiracies constitute a threat to Zenith's business, thus granting Zenith's competitors complete immunity under the antitrust laws to damage Zenith's business.

The report of the Canadian Royal Commission, introduced as respondents' evidence and to which the Court of Appeals makes no reference, categorically states that there is a threat posed by the Canadian pool. The report said (Pl. Ex. 50 A; R. 2162):

> "The portfolio in respect of which CRPL had the right to grant licenses consisted of 5,000 patents, and in the absence of a license from CRPL it is doubtful if any one could sell in Canada a radio or television receiver * * *. It is particularly in respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission."

A finding of no threat of injury in the face of such an admitted conspiracy completely eviscerates the sanctions of the Federal antitrust laws.

In May, 1959, Brian McConnell, the head of CRPL, told Zenith's Vice President Crotty, that Zenith was infringing pool patents, "one of which was a patent of Hazeltine origin. He told me that we would have to take a license; that the license could not be for importation, it would have to be for local manufacture." (R. 1332). This conversation was not denied and was confirmed by Mc-

Connell's June 5, 1959 letter enclosing the pool's standard license which forbade importation (Def. Ex. 154, R. 3263).

The effect of the Court's holding on the injunction issue is to leave Zenith's foreign business in the Canadian market exposed to ruinous infringement litigation and at the mercy of the pool's enforcement policy. Zenith cannot get protection by taking a license under Hazeltine's domestic patents because Hazeltine has contracted with the pools not to grant a license to export and Zenith cannot get a license to import from the pools. Moreover, the Court's opinion reaches the incongruous result of permitting Hazeltine to be a member of the foreign patent pools which violate the antitrust laws and to enjoy the fruits of those pools, thus putting the Court's imprimatur on such illegal activity.

The Dismissal of Hazeltine Corporation.

Compounding the injustice done Zenith by its fact of damage and injunction ruling, the Court of Appeals in its opinion sets up as new law for the Seventh Circuit an unprecedented constitutional doctrine employing the corporate fiction not for the promotion of justice but to shield Hazeltine Corporation from all liability for its illegal conduct. At a pre-trial conference on April 3, 1963, in the presence of the trial judge, all counsel agreed to a stipulation whereby Hazeltine Corporation and Hazeltine Research, Inc. would be regarded as one entity for the purpose of the litigation. The written stipulation dated May 7, 1963 provided:

> "The parties to this Action, by their attorneys, in fulfillment of certain understandings reached orally in the course of the pre-trial conference held herein on April 3, 1963, in order to simplify and expedite trial hereby stipulate and agree, for purposes of this Action, only as follows:
>
> • • • • •

"4. Plaintiff agrees that for purposes of this litigation Plaintiff and its parent Hazeltine Corporation will be considered to be one and the same company." (R. 43)

The stipulation was signed by L. B. Dodds, chief trial counsel for Hazeltine who, in an affidavit filed on May 10, 1963, stated (R. 41):

"He has been retained by or employed by Plaintiff's parent Company, Hazeltine Corporation, continuously since 1934 and has been a Vice President of said Hazeltine Corporation continuously since 1939 (except for a period during 1944-45 when he had no connection with Hazeltine Corporation or any of its affiliates). He also was an officer of Plaintiff, Hazeltine Research, Inc. from its organization in 1946 until June 7, 1961. Since 1946 he has been continuously familiar with the patents and the patent licenses of both Plaintiff and its parent Hazeltine Corporation."

At the trial of the antitrust counterclaim Dodds testified (R. 1696):

"That is correct. There is a stipulation on the record that solely for the purposes of this action plaintiff Hazeltine Research and the parent Hazeltine Corporation can be considered as a single entity."

No one from the parent, Hazeltine Corporation, denied Dodds' authority to make the stipulation during the trial. Ruestow, who was General Patent Counsel for the Hazeltine Corporation (R. 1199), and Westermann, who was Vice President and General Counsel of Hazeltine Corporation (R. 1493), and both of whom were present during the trial and thoroughly familiar with the stipulation, never said one single word in repudiation thereof.

Consistent with the stipulation, the record and the understanding of the Court and counsel, following the trial Hazeltine submitted the following proposed finding of fact:

"Jurisdiction and Parties:

* * * * *

"8. It is stipulated that, for the purposes of this Action, Hazeltine and H. C. may be considered a single legal entity to avoid the issue of whether or not it is appropriate to 'pierce the corporate veil', but it is proper to consider the separate and unrelated activities of the two companies separately." (Z. R. 467, 468).

On the basis of proposed finding No. 8 above, Hazeltine counsel further sought to have the trial court enter findings of fact and conclusions of law in favor of the Hazeltine Corporation on practically every issue in the case (Z. R. 467-492).

However, after the District Court entered its own contrary findings, Hazeltine Corporation hired new counsel who appeared on its behalf and for the first time contended that the entry of judgment would deny it due process of law, claiming Dodds "neither intended nor had authority to bind Hazeltine Corporation" (R. 229, 231). The District Court after a hearing on this contention found against the Hazeltine Corporation but the Court of Appeals in reversing without remand now holds that the "Corporation's appearance after the trial was not sufficient opportunity to be heard under the due process clause."

In the interest of justice, any decision of the Court of Appeals which so departs from the basic principles applicable to trial stipulations, should have the careful consideration of this Court.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals, in reversing the trial court's injunction prohibiting Hazeltine from participating in the activities of foreign patent pools, has given Section 16 of the Clayton Act an interpretation in conflict with Congressional intent and in conflict with the decisions of this Court, and has granted immunity to such pools to stop the export of American products to foreign markets. The effect of the Court of Appeals' decision is not only to leave Zenith's foreign trade exposed to attacks by its competitors who are members of foreign pools, but to stop the trade of any other American electronics company in the foreign markets here involved.

The decision in question is contrary to this Court's opinion in *Bedford Cut Stone Co.* v. *Journeymen's S. C. Association,* 274 U. S. 37, 54-5 (1927) where in a private action for injunctive relief under Section 16 of the Clayton Act, this Court held:

> "The record does not disclose whether petitioners at the time of bringing suit had suffered actual injury; but that is not material. An intent to restrain interstate commerce being shown, it is enough to justify equitable interposition by injunction if there be a dangerous probability that such injury will happen; and this clearly appears. The Anti-trust Act 'directs itself against that dangerous probability as well as against the completed result'."

See also *Vicksburg Water Works Co.* v. *Vicksburg,* 185 U. S. 65, 82 (1902).

Because it could find no proof of the fact of damage, even though the trial court had found it abundantly proven, the Court of Appeals said: "It follows from our

conclusion with respect to the foreign patent pools that injunctive relief against 'threatened loss or damage' directed at those pools, alleged by Zenith to be unlawful conspiracies, cannot be justified under 15 U. S. C. Sec. 26. Paragraph C of the injunction granted must be stricken.''

The Court of Appeals' decision recites:

> ''The district court concluded that the alleged conspiracies had as their express purpose prevention of importation of TV apparatus made in the United States, that HRI, by participating in the conspiracies had violated the Sherman Act and that Zenith had established that it had been injured in its business as the result of the unlawful activities of the pools.''

The Court of Appeals reversed the finding of injury but never reversed the finding of an unlawful conspiracy nor of Hazeltine's participation therein.

Hazeltine's counsel, Dodds, when cross-examined on this issue in January, 1962 stated the following with reference to the Canadian pool:

> ''Q. You knew something was going on in the way of an attack by American companies against that pool, didn't you?
> ''A. Yes.
> ''Q. You had known that for a long time?
> ''A. Yes.
> ''Q. You still stayed in the pool?
> ''A. Most definitely and we intend to continue to stay in the pool.'' (R. 1775.)

This decision involves the activities of the foreign subsidiaries of the largest electronics companies in the world. They include, among others, General Electric, Westinghouse, RCA, the Philips Company of Holland, British General Electric, Electrical and Musical Industries, Standard Telephone and Cables, Telefunken, Marconi Wireless, and the Hazeltine companies (R. 2448-9, 2493-4, 2879, 3549-3719). The case is a matter of widespread interest and knowledge all over the world.

The large public interest involved is shown by proceedings before the Patents, Trademarks and Copyrights Sub-Committee, Committee on the Judiciary, United States Senate Hearings, June 1, 2 and 3, 1965, where Senator Russell B. Long states (p. 331):

> "What is especially intolerable is that U. S. Government funds paid for 90 percent of the research which enabled this Company [Hazeltine] to accumulate its patents. In essence, then, public funds have been used to prevent Americans from exporting their goods. Indications are that this practice is widespread, and the effects on our balance of payments are undoubtedly very serious * * *. International patent pools can also undermine our national safety. They have been used in the past to transmit military information—even to our enemies."

The decision of the Court of Appeals, holding as a matter of law that pools designed to stop imports pose no threat to American electronics companies such as Zenith who are prepared to compete in foreign markets and cannot be prevented under the provisions of Section 16 of the Clayton Act, completely nullifies that Act.

This Court now has before it a decision which in effect encourages the Hazeltine companies to continue in the pools which admittedly violate the American antitrust laws and to enjoy the fruits of those pools, thus putting the sanction of the Court of Appeals for the Seventh Circuit on such illegal activity.

A question of the proper construction of Section 16 of the Clayton Act is involved, charged with tremendous public interest in that it involves the destruction of foreign markets in Canada, England, and Australia for all American electronics companies prepared to compete in those markets.

II.

The holding that the fact of damage is not shown on this record is in direct conflict with the opinions of this Court and in effect reverses this Court in so far as the application of its decisions on proof of damages in antitrust cases is concerned in the Seventh Circuit.

Many years ago the writer of this petition appeared before this Court in the case of *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251 (1946) in which this Court reversed the Court of Appeals for the Seventh Circuit for holding, as it does here, that as a matter of law no "fact of damage" was shown in a case decided by a jury in favor of the plaintiff.

The instant case in effect reverses the *Bigelow* decision in that the Seventh Circuit again undertakes to decide a question of fact in an antitrust suit *de novo* and without giving any consideration to the damage findings of the trial court.

In *Bigelow,* this Court ruled that where plaintiff proves a loss and violation by the defendant of the antitrust laws of such nature as to be likely to cause the type of loss as in fact occurred, the jury or the trier of fact must be permitted to draw from this evidence the inference that the necessary causal relation exists.

Here, the trier of the fact, who was an experienced trial judge, drew the inference that Zenith was damaged by the pool from the fact that in Canada Zenith had only 5% of the market, whereas in the United States it had 20% of the market, although the competition was the same and the two markets comparable. The District Judge was supported in this conclusion by the uncontradicted testimony of Wright and Kaplan. The Court of Appeals now holds that the trial court could not draw such an inference of injury as a matter of law.

In the instant case, all the wrongdoer has to do to gain immunity under the antitrust laws is to view this record to see how much leeway is given to him by the instant opinion. Here, the wrongful conduct is not only approved, it is almost regarded as a laudable endeavor.

The instant opinion is also in conflict with this Court's decision in the case of *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690 (1962). The court below holds that repeated and futile demands for unavailable pool licenses are a condition precedent to establish the fact of damage in the instant action. The opinion says that Zenith "did not seek a pool license after 1953." A license to import was expressly found by the trial court to be unavailable (Finding XXVI, R. 118). This Finding is not reversed by the Court of Appeals. In contrast, this Court said in *Continental* (p. 699):

> "Furthermore, we do not believe that respondents' liability under the antitrust laws can be measured by any rigid or mechanical formula requiring Continental both to demand materials from respondents and to exhaust all other sources of supply."

In the same case this Court said (p. 696):

> "The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. From our examination of the rather extensive record, we have concluded that the Court of Appeals departed from this rule and erred in holding that there was insufficient evidence to support a finding that respondents' conduct in fact caused injury to Continental's business."

The court below did not even pay lip service to this principle. It treated the case as though it was hearing it *de novo*.

In a footnote in the *Continental* case, this Court again reaffirmed *Bigelow*, saying (p. 697):

> "Thus in *Bigelow* this Court stated: '[I]n the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs. 327 U. S., at 264. 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created'."

The Court of Appeals' decision has given *carte blanche* to illegal pools to wreck Zenith's foreign trade. In its petition for rehearing in the Court below, Zenith offered to prove that in 1967 this foreign trade in color television sets in Canada alone amounted to over twenty million dollars. This market was gained while petitioner was operating under the protection of the District Court's injunction. Not only is Zenith's trade to be threatened but also the trade of all other American companies similarly situated.

The Court of Appeals' decision completely destroys the application of all antitrust laws to foreign patent pools. It is hard to imagine a case where the interests of the public and the interests of American trade and commerce and the interest of the United States in correcting an adverse balance of trade more completely justify this Court in granting its Writ of Certiorari.

III.

While the Court of Appeals holds that Hazeltine's offers of individual color patents at royalty rates substantially in excess of the annual rate for the package of all patents, color and monochrome, "constituted an illegal attempt to force acceptance of the standard package and a misuse of patents", it reverses the District Court's finding of misuse with respect to a similar offer for monochrome patents. The District Court had found that Hazeltine's offer of one patent at 50% of the package rate, two patents at 80% of the package rate, and three or more patents at 100% of the package rate was "an attempt by economic coercion to force the taking of the package" (Finding XI, R. 112-3). The misuse inherent in this formula was admitted by Hazeltine's chief patent counsel in a confidential memorandum (Def. Ex. 24; R. 2335):

> ". . . if I offer the 50%, 80%, 100% deal they [petitioner] pick 10 patents and zingo we are right back in misuse."

Since the 50-80-100% formula obviously bears no relation "to the quality of each patent", the decision below directly conflicts with the holding in *American Securit Co.* v. *Shatterproof Glass Corp.*, 154 F. Supp. 890, 895 (Del., 1957), affirmed 268 F. 2d 769, 777 (C. A. 3, 1959), cert. den. 361 U. S. 902 (1959).

The Court of Appeals also misconstrues this Court's decision in *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827 (1950). The Court below reads this decision as permitting a patentee to compel its licensees, under threat of infringement suits, to pay royalties on their entire production whether or not any patents are used. This is a requirement for a license under any patent of Hazeltine and, as the District Court found, is an attempt to collect royalties on unpatented products and to discour-

age licensees from inventing around the applicable patents during the five-year license term (Finding XII, R. 113). That this provision was not just a matter of convenience in computing royalties was shown by Hazeltine's own documents (Def. Ex. 38; R. 2391-2):

> ". . . Under the Hazeltine system of applying the royalty percentage to the selling price of the manufacturer's television sets regardless of what Hazeltine patents, *if any,* are used in the particular sets (in accordance with *Hazeltine* v. *Automatic Radio*) it would not make any practical difference in Hazeltine's income if he switched to the alternate . . . design [that doesn't use the licensed patents]."

Nothing in *Automatic Radio* approves exaction of such a royalty base from an unwilling licensee and the decision below represents an improper extension of the holding in that case.

CONCLUSION.

For the reasons given, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

The statutory and rule provisions involved are:

Section 1 of the Sherman Act, 15 U. S. C. § 1, providing in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

Section 2 of the Sherman Act, 15 U. S. C. § 2, providing in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . .".

Section 4 of the Clayton Act, 15 U. S. C. § 15, providing:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 16 of the Clayton Act, 15 U. S. C. § 26, providing in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and un-

der the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . .".

Rule 52(a) of the Federal Rules of Civil Procedure providing in pertinent part:

". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

HAZELTINE RESEARCH, INC.,
Plaintiff,
vs.
ZENITH RADIO CORPORATION,
Defendant.
No. 59 C 1847.

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO THE ANTITRUST ISSUES RAISED IN THE ANSWER AND COUNTERCLAIM.

Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the court hereby makes the following findings of fact and conclusions of law:

I. The antitrust issues raised in the answer to this patent infringement suit and in the counterclaim for damages and injunctive relief were separately tried following the trial of the patent issues. Defendant in its answer (R. 6-9) asserted the affirmative defense that plaintiff was misusing its patents, including the patent in suit, in violation of public policy and the Sherman Act (15 U. S. C. §§ 1 and 2) and that it, therefore, came into this court with unclean hands and is therefore barred from receiving any relief in this action. Defendant also filed a counterclaim (R. 48-52) for damages and injunctive relief pursuant to Rule 13(a) of the Federal Rules of Civil Procedure, Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1, 2)

and Sections 4 and 16 of the Clayton Act (15 U. S. C. §§ 15, 26).

II. Defendant-Counterclaimant, Zenith Radio Corporation, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 6001 W. Dickens Avenue, Chicago, Illinois (R. 53), and is now and has been continuously for more than 43 years last past engaged in the development for sale and use and in the manufacture, sale and use of radio apparatus and receiving sets, and since the advent of television, television receiving sets throughout the United States and in foreign commerce, and during said period has built up a large volume of business in manufacturing and selling as the demand therefor has existed and will continue to exist, and in the shipment and sale of such apparatus in commerce between the various states of the United States and in foreign commerce, and said counterclaimant is now and has been engaged in said commerce during all of the period above stated and during all times material to this counterclaim (R. 1372-78).

III. Counterdefendant, Hazeltine Research, Inc., the party plaintiff in this suit, is an Illinois corporation owned and operated as a wholly owned subsidiary of Hazeltine Corporation, a New York corporation, engaged in the manufacture and sale of electronic equipment and devices (R. 53). The parties stipulated (R. 43, 1035, 1696) that for the purposes of this litigation Hazeltine Research, Inc. and its parent, Hazeltine Corporation, would be considered as one entity operating as a patent holding and licensing company, engaged in the exploitation of patent rights in the electronics industry in the United States and in foreign countries (Def. Ex. 32, R. 2373-74). The gross income of the Hazeltine enterprises approximates $47,000,000 per year (Def. Ex. 1, R. 2187).

IV. For many years plaintiff has accumulated a large number of patents, domestic and foreign, for use in its patent licensing business in the electronics industry (Def. Ex. 1, R. 2195). At the time of the filing of this suit Hazeltine had over five hundred patents and patent applications in its licensing portfolio (R. 1193).

V. Plaintiff's policy in licensing electronics manufacturers in the United States was to grant a so-called standard package license (Def. Ex. 2, R. 2203) which conferred on the licensees for a five-year period freedom from any charge of infringement under all present as well as future Hazeltine patents issuing during the term of the agreement (Def. Ex.'s 2, 3, R. 2205, 2239). Royalties were required to be paid on the licensee's entire production whether its products employed any or none of the Hazeltine patents (Def. Ex. 2, Art. III, R. 2207, Def. Ex. 38, R. 2391-2). The license was in effect a covenant not to sue the licensee or its customers should Hazeltine decide within the license period that the manufacture and sale of any particular apparatus infringed upon any of its patent rights (R. 1526, Def. Ex. 27, R. 2356).

VI. Hazeltine filed numerous patent infringement suits against manufacturers who refused to sign its license agreement (Def. Ex. 32, R. 2374-74b).

VII. Prior to the instant controversy, Zenith had the standard Hazeltine package license and in May of 1959, toward the close of the last five-year license period, Hazeltine requested that the license be renewed for another five-year period at the then package rate of $50,000 per year (R. 1356-57). Zenith refused, contending that it did not require a license under any of the patents in the package and Hazeltine countered by asserting that Zenith was infringing at least four of the Hazeltine patents in the manufacture and sale of monochrome television receivers

(R. 1357-58) (at that time Zenith was not manufacturing color receivers (R. 1358)). At the same time Hazeltine made an alternative proposal to Zenith, offering to grant a monochrome license in accordance with the following formula:

> Any one patent in the package would be licensed at 50% of the royalty rate for the entire package of over 500 patents and patent applications. Any two patents would be licensed at 80% of the package rate. Any three or more patents would be licensed at 100% of the package rate (R. 1358-59). Hazeltine reserved the right to sue for infringement of any patent not licensed. All licenses would otherwise be subject to all the terms and conditions of the standard package form of license (Def. Ex. F-10, Z. R. 962) and would require payment of royalties on all production during the five-year term of the license irrespective of whether any patent was employed or not (Def. Ex. 2, R. 2207, 1359). The license would not cover color television receivers (Def. Ex. F-10, Z. R. 962, R. 1359).

Zenith refused to sign either of the proposed agreements and on November 20, 1959 the instant suit was filed.

VIII. With the suit on file and at issue, Hazeltine continued its attempt to persuade Zenith to sign the package license. During the course of discovery proceedings Hazeltine informed Zenith that in addition to the patent in suit, Zenith was infringing at least 9 designated Hazeltine patents and applications in the manufacture and sale of its color television receivers (R. 1202-03, 1341). The old form of standard package license under all the Hazeltine patents was again tendered to Zenith for signature and Zenith again refused to sign it (Def. Ex. 10, R. 2258, 1342).

IX. On April 11, 1962, Hazeltine submitted to Zenith a license proposal for color television which provided an annual royalty rate of $435,000 merely for the 9 patents

asserted and an annual rate of $500,000 for a license under all of Hazeltine's patents and patent applications for color television (Def. Ex. 12, R. 2261, 1344-45). However, if the standard package license covering all of Hazeltine's patents, for monochrome as well as color, were signed, the maximum royalty rate would be $150,000, the same as the rate in the Hazeltine-RCA package license (later raised to $200,000) (R. 1345-47, 1209). Zenith refused these proposals on the grounds that they were obviously designed to force Zenith to take the package license which it did not want or need (R. 1348-49, Def. Ex. 13, R. 2280); that Zenith could not place itself at a competitive disadvantage by taking a license under only 9 patents at $435,000 a year rather than signing the package license containing all Hazeltine patents at the package rate of $150,000 per year (R. 1348).

X. Hazeltine continued its efforts to persuade Zenith to sign the standard package license before this case could be brought to trial (R. 1349-50). In March 1963, as the case approached the final pre-trial conference, Hazeltine made the following proposal to Zenith (Def. Ex. 15, R. 2283):

> It grouped together the nine patents and one application which were claimed by Hazeltine to be employed in the manufacture of Zenith color receivers (R. 2284). It placed a maximum royalty on this package of $275,000 per year but for color receivers only (¶ III (A), R. 2285, 1352). For the entire package containing all of Hazeltine's then existing patents for color television an annual maximum of $300,000 (¶ III(B), R. 2285, 1352) was set and for all present as well as future patents issued during the license period an annual maximum of $310,000 was demanded for color television alone (¶ III(C), R. 2285, 1352).
>
> In this same license proposal, Hazeltine offered its entire package of present and future patents, unspecified, for both monochrome as well as color receivers

for an annual maximum of $200,000 (¶ IV(A), R. 2286, 1353, 1513-14).

Under this proposal, a license could be taken, if desired, under only two of the ten patents asserted against Zenith's color receiver but it would bear an annual maximum royalty in excess of $200,000 and would license only color receiver production (R. 1523), whereas the entire package of over 500 patents and applications for both monochrome as well as color receivers would bear an annual maximum of $200,000 (¶ IV(A), R. 2286). This proposal was obviously designed to persuade Zenith to sign the standard package license agreement (Def. Ex's 27, 30, 34-B, R. 2353, 2367-68, 2383) which it was unwilling to do and presented to Zenith management the following alternatives:

1. Endure trials and possibly appeals on at least nine patents at a total estimated cost of over one million dollars, plus damages in the event any or all of the suits were lost (R. 1472-6).
2. Take a license under the package of ten patents and applications at a cost of $275,000 per year for color television (¶ III (A), R. 2285), or a license under the entire package of existing Hazeltine patents for color television at a cost of $300,000 per year (¶ III (B), R. 2285), or at a cost of $310,000 per year a license covering existing and future patents of Hazeltine for color television (¶ III (3), R. 2285) for a five-year period. In each case Zenith would be obliged to make the royalty payment whether any of the patents licensed was used or not in Zenith's color receiver (Def. Ex. 18, Art. III, R. 2295). This would still leave Zenith's entire monochrome production open to continuous attack by Hazeltine, and plaintiff's counsel had already claimed that Zenith's monochrome receiver infringed at least three patents in addition to the patent in suit (R. 1357).
3. Take a license for color television under two patents selected from the package of ten and pay over

$200,000 per year (R. 1523), but this would expose Zenith's color production to the assertion of any or all of the color patents not licensed and would subject its entire monochrome production to the assertion of any of the hundreds of patents in the Hazeltine package.

4. Take the standard package license under all patents and patent applications of Hazeltine, present and future, for both monochrome and color television at an annual maximum of $200,000, per year (¶ IV (A), R. 2286, 1353, 1522).

Over a five-year license period it would cost $500,000 to $550,000 more for a license under the small group of ten patents for color television alone than for the entire Hazeltine package covering over 500 patents and applications for monochrome as well as color television. In addition, the full package license would remove the risks of further protracted and expensive litigation or harassment (R. 1526), whereas the more expensive license under less than the entire package would leave Zenith and its customers exposed to renewed charges of infringement based on any or all of the remaining hundreds of existing Hazeltine patents as well as all patents issuing during the term of the license (Def. Ex. R. 2252). The only practical answer would be to accede to Hazeltine's demand and accept a full package license.

XI. Plaintiff's offer to license any one of its hundreds of patents for monochrome at 50% of the package rate, any two at 80% of that rate and any three or more at the full package rate was an attempt by economic coercion to force the taking of the package (R. 1557, Def. Ex. 24, R. 2335). This is clear from the fact that plaintiff had asserted that Zenith was infringing at least 4 patents in its monochrome receivers (R. 1357). Moreover, the reward demanded by plaintiff for a license under less than the full package of patents is in no way related to the quality

of the patents since the price is determined solely by the number of patents chosen (R. 1358-59, 1558-59) and most of the patents in the package are characterized by Hazeltine itself as "insignificant". (Def. Ex. 22, R. 2318, 1524, 1563).

XII. In all of its proposals to Zenith, Hazeltine insisted as an alternative to litigation that Zenith for a period of five years pay royalties in large sums based on its entire production of receivers whether or not any Hazeltine patent was employed in any way in its products. Plaintiff thus insists that royalties be paid on admittedly unpatented apparatus. (Def. Ex. 2, Art. III, Ex. 18, Art. III, R. 2207, 2295, 1359).

XIII. As of the date the trial began Defendant had been injured in its business and property as the proximate result of the acts and demands of Hazeltine, referred to above, in the amount of $50,065 (R. 1472-76). Defendant has been forced to make expenditures of money and to use the time of its officers, employees, and counsel to defend against this patent infringement suit, and by virtue of Hazeltine's threats of suits on other patents, defendant has been forced to expend substantial amounts of money to investigate the scope and validity of the patents asserted (R. 1473). The injury to Zenith's business was occasioned by the necessity that defendant make a choice among alternatives each of which had an adverse economic effect on its business. It was forced either to cease manufacturing and selling its television receivers, pay tribute with consequent increase in its costs or incur the expenses incident to the defense of protracted patent litigation. Although defendant's choice determined the nature and amount of the resulting damages, it was the necessity of having to choose that occasioned the injury.

XIV. In its counterclaim (R. 48-52) Zenith also seeks damages and injunctive relief based on plaintiff's conspira-

torial activities with foreign cartels or patent pools in England, Canada and Australia which have curtailed Zenith's export business.

The British Patent Pool.

XV. The dominant radio and electronics companies in Great Britain (Z. R. 208-12) set up the British Pool into which flow thousands of patents owned or controlled by the members and those affiliated with them in the plan. Among these companies are Electric & Musical Industries Ltd., General Electric Company, Ltd., Marconi's Wireless Telegraph Co. Ltd., Philips Electrical Ltd. (R. 2448-49), Pye Ltd. (R. 2514), Murphy Radio Ltd. (R. 2471), Rank Cintel Ltd. (R. 2491), Standard Telephone & Cables Ltd. (R. 2466), Gramophone Co. Ltd. (R. 2448) E. K. Cole Ltd. (R. 2476) and Cossor Ltd. (R. 2480). The Hazeltine inventions and patents have been funneled into the Pool pursuant to an agrgeement with General Electric Co. Ltd. (Def. Ex.'s 42-50, R. 2408-2436) and the share of the Pool's income allocated to these patents is split between General Electric Co. Ltd. and Hazeltine (R. 1127, 1242-43, 1252-53, Def. Ex's 42, 78B, R. 2408, 2685). Pursuant to this arrangement British inventions controlled by General Electric Co. Ltd. are licensed to Hazeltine for exclusive licensing use in its American territory (Def. Ex.'s 38-B, 42, R. 2398, 2409) and are included in its United States package licensing activities (R. 1561, 2399-2400). The Hazeltine-General Electric Co. Ltd. exclusive agreements were specifically devised to get the Hazeltine patents into the British Patent Pool in a manner which would provide for G. E. C. maximum bargaining power vis-a-vis the other Pool members on the division of the Pool income (Def. Ex.'s 42, 96, R. 2408, 2746).

XVI. Pursuant to these arrangements, General Elec-

tric Co. Ltd. on its own behalf and on behalf of Hazeltine entered into successive pooling arrangements (Def. Ex.'s 51-60, R. 2437-2519) with the other members of the British Pool wherein and whereby it was agreed that the Hazeltine patents along with the patents of all of the Pool members be licensed in the territory of Great Britain solely by the Pool (R. 2439, 2464, 2510) and on terms and conditions determined by the members of the Pool (R. 2440, 2458, 2505). Each of the participating parties in all of the interrelated agreements, including Hazeltine by virtue of the exclusivity of its joint arrangements with General Electric Co. Ltd., contractually pledged that during the period of the agreements no license would be issued that would permit the export of radio and television receivers from the United States into the British market (R. 2442, 2455, 2501) and that the only license employed by the Pool would be a standard package license limited to local manufacture (Def. Ex.'s 61 ¶ 2l, 62 ¶ 4b, 63 ¶ 4b, 65 ¶ 4a, 66 ¶ 4a, 67 ¶ 4a, 68 ¶ 4a, 69 ¶ 4a, 70 ¶ 2a, 71 ¶ 2a, R. 2523, 2535, 2553, 2568, 2580, 2591, 2603, 2615, 2625, 2635-36). Hazeltine has been participating in this plan and arrangement since 1938 (Def. Ex. 42, R. 2408), is currently participating in it (Def. Ex. 50, R. 2433, 1291, 2028) and intends (R. 1100) to continue its participation.

XVII. Hazeltine has had full knowledge of the various interrelated agreements under which the Pool operates and has operated (R. 1115, 1120, 1127, 1130-34, 1141, 1238, 1289-90) and the purpose and effect of the plan which is to protect the British manufacturers in the Pool against competition from television receivers made in the United States and other countries (Def. Ex's 91, 92, 94, R. 2729, 2734, 2742). Hazeltine contends that it has entered into these arrangements because in that manner it can obtain more income from its English patent properties than it could through its own individual effort (R. 1051, 1821).

XVIII. The Pool has always issued one form of license which, like the Hazeltine package license in the United States, covers all of the patents in the pool (Def. Ex's 38-B, 62, 63, 65, 66, 67, 68, 69, 70, 71, R. 2400, 2533, 2551, 2567, 2578, 2589, 2601, 2613, 2624, 2635) and requires payment of royalties on all of the licensees' production whether or not any of the patents are employed (Def. Ex's 62, 63, 65, 66, 67, 68, 69, 70, 71, R. 2536, 2554, 2568, 2580, 2591, 2603, 2615, 2627, 2637). The effect of this plan is to amass all of the patents for assertion against anyone not licensed, to prevent importers or foreign manufacturers from entering the market and to preclude the possibility of any attack by the licensees on the validity of any one patent (Def. Ex's 65, 66, 67, 68, 69, 70, 71, 91, R. 2571, 2584, 2595, 2607, 2619, 2630, 2640, 2729).

XIX. The policy of the Pool was early stated to be to cooperate in the division of territories provided by the plan and "not knowingly [to] assist any [American] company to sell in England under the protection" of the Pool patents apparatus manufactured in the United States and not licensed under the patents of the Pool's American participants (Def. Ex. 94, R. 2742, Def. Ex's 100, 111, R. 2755, 2799). RCA and General Electric, like Hazeltine, for many years participated in the British Pool (Def. Ex's 51, 72, 92, R. 2437, 2644, 2734). However, as the result of anti-trust litigation brought by Zenith and by the Government RCA and General Electric were forced to cease their participation in the plan (R. 1372-77, Def. Ex. 114, R. 2849, Pl. Ex. 45, Z. R. 570).

XX. Initially the strength of the Pool was drawn from patents on radio receivers and with the advent of television, the power of the Pool became greater than ever. Color television is the most recent innovation in the home entertainment field and Hazeltine has now become an even more important factor in the British combination because

of its color television patents which Hazeltine contends has given it a "dominating position" in the color television field (Def. Ex's 32, 76-B, 81, R. 2373, 2673, 2704).

XXI. For years Zenith made every effort to export home receivers to distributors and dealers in the English market. On each occasion, however, the Pool threatened its distributors until they ceased buying Zenith products and no substantial trade outlets could be found which would risk handling the line since the Pool would not license the sale of imported merchandise (R. 1384-85, 1395-96, Def. Ex's 100-109, R. 2755-2787).

XXII. As a part of the settlement of antitrust litigation brought against RCA, General Electric and Western Electric, Zenith was in 1957 granted royalty-free world-wide rights under the inventions and patents of these companies (Def. Ex. 114, R. 2849-2875) and began to ship radios to the British market (R. 1385). The Pool could not assert any of these rights to prevent importation and since all basic radio patents have expired, Zenith has been able for the first time to export to and sell its radio receivers in the English market (R. 1386). This is not true of television apparatus however (R. 1386, 1396). The Pool is armed with thousands of patents from the Pool members including the British counterparts of patents asserted by Hazeltine against Zenith in the United States (R. 1066, 1195, Def. Ex's 1, 32, R. 2195, 2374). Zenith has been constrained from entering the British television market by the threat of the assertion against it of pooled patents, although Zenith has successfully engineered sets for the British market and has shipped same to its English distributor with the hope that the injunctive relief sought in this suit would be granted and business on a commercial scale could be conducted (R. 1386, 1453).

XXIII. The manufacture in the United States of receivers for sale to exporters here or directly to importers

in England (or in Canada and Australia where corresponding patent pools are operating) would risk further charges by Hazeltine of infringement of the United States patents asserted against Zenith here and Hazeltine, by virtue of its exclusive arrangements (R. 2651, Def. Ex's 43, 46, 48, R. 2410, 2419, 2426) with the English companies, is contractually unable to grant a license to manufacture in the United States for export to and sale in England under the British counterparts of its domestic patents. Hazeltine's United States package license expressly states, in compliance with the restrictions involved in the pooling arrangements (Def. Ex. 51, R. 2439. Def. Ex. 52, R. 2451, 2455, 2464, Def. Ex. 58, R. 2494, 2501, 2510, Def. Ex. 118, R. 2891, Def. Ex. 180, R. 3551), that no license is granted under any patent rights of countries foreign to the United States (R. 1720, Def. Ex's 2, 18, R. 2207, 2295).

XXIV. Hazeltine has always told its licensees in the United States that as a matter of policy it would never collect a second royalty on sets exported to foreign countries "where Hazeltine had complete control over its patent situation" (Def. Ex. 115, R. 2876) but that with respect to England, Canada, Australia and New Zealand, where Hazeltine patents are included in an industry-wide pool, the American licensees would have to make their own arrangements with such Pools (Def. Ex. 116, R. 2878).

The Patent Pool in Canada.

XXV. The patent pool existing in Canada is called Canadian Radio Patents Limited. This organization was formed in 1926 by the General Electric Company of the United States through its subsidiary, Canadian General Electric Co. and by Westinghouse, through its subsidiary, Canadian Westinghouse (Pl. Ex. 50A, R. 2161, Def. Ex's 117, 125, R. 2879, 3076). The shareholders of Canadian Radio

Patents Limited are Canadian General Electric, Canadian Westinghouse, Standard Radio Mfg. Corp. Ltd., the Canadian subsidiary of Philips of Holland, Canadian Marconi and Northern Electric (an affiliate of AT&T and Western Electric). The Pool has been largely made up of Canadian manufacturers (most of which are subsidiaries of American companies (Z. R. 204-7)) who were and are competitors of Zenith with respect to sales sought to be made in Canada (R. 1379). The Pool for many years has had the exclusive right to sub-license not only the patents of the member companies but also the patents of Hazeltine (Def. Ex's 118, 119, R. 2887, 2914), RCA and a number of other foreign companies (Def. Ex's 125, 142, R. 3076, 3207, Pl. Ex. 50-A, R. 2161-62). Since 1943 Hazeltine has been an active participant in the activities of the Pool and has been receiving a substantial share of its profits (R. 1083, Def. Ex's 118, 118-A-B-C, 119, R. 2887-2914). The Hazeltine patents go into the Pool pursuant to an exclusive license agreement between Hazeltine and Canadian Radio Patents Limited (Def. Ex. 118, R. 2887) which grants to the Pool the right to include Hazeltine's Canadian patents, present and future, in its licensing and litigation activities. This arrangement has been extended to a date beyond the filing of the instant counterclaim (Def. Ex. 119, R. 2914).

XXVI. The organization, purposes, and functions of the Canadian Pool are, in principle, identical to those of the English Pool. Approximately 5000 patents are amassed for licensing (Pl. Ex. 50-A, R. 2162) and the only form of license available is strictly limited to manufacture in Canada (R. 1376, 1629, Def. Ex's 123, Art. II, sec. 1, 150, 162-D, R. 2967, 3255, 3297). It is also a package license under all patents in the Pool and all patents issuing during the term of the license (Def. Ex. 123, Art. II, sec. 2, R. 2967). The chief purpose of the Pool is to protect the manufacturing members and licensees from competition by

American or other foreign companies seeking to export their product into Canada (R. 1054, 1627, Def. Ex's 142, 164, R. 3209, 3312).

XXVII. The Pool's campaign against importation of radio and television receivers from the United States is highly organized and effective. Patent agents, investigators and agents of the conspiring companies as well as the Canadian manufacturers and distributors trade associations at the behest of the Pool have systematically policed the market in order to locate and stop the sale of imported receivers and have immediately attacked by infringement suit or threat thereof any dealer found to be selling imported receivers (Def. Ex's 129, 139-141, 143, 144, R. 3089, 3132-3204, 3210, 3215). Warning notices (Def. Ex's 131-138, R. 3107-3122) addressed to importers, vendors and users of radio and television receivers advise the trade and the public that only the products of certain named local manufacturers are licensed by the Pool under "basic patents" and that even "users" of unlicensed products are subject to suit on account of patent infringement. Many advertisements run by the Pool went much further. They contained disparaging statements about imported receivers to the effect that they were cheaply made, unsatisfactory in operation, caused fires and were dangerous to use because of "shock hazard" (Def. Ex. 130, R. 3103-06).

XXVIII. Mass attacks in the form of infringement suits were made on dealers found to be selling imported American made radio and television receivers. Suits or the threat of suits effectively prevented dealers from handling American made sets (Def. Ex's 143, 144, R. 3212-19).

XXIX. For many years Zenith attempted to set up distribution for its products in Canada (R. 1372-5) but in every instance where a Canadian distributor began to sell Zenith products he was warned by the Pool to stop and return the merchandise or face expensive infringement liti-

gation (R. 1372, Def. Ex's 155-162, R. 3264-88). To ward off these attacks Zenith attempted to get a license from the Pool, but in every instance it was advised by the Pool manager that importation would not be permitted and, only local manufacture would be licensed (R. 1332, 1373, Def. Ex's 146-154, R. 3224-3263).

XXX. As a part of the settlement in the Zenith litigation against RCA, General Electric and Western Electric which involved the activities of the Canadian patent pool, Zenith obtained world-wide rights under the patents of the defendants (Def. Ex. 114, R. 2849, 1372-76) and having obtained these and other patent licenses permitting importation into Canada, Zenith began late in 1958 to export to and sell in Canada its radio and television products through its Canadian subsidiary, Zenith Radio Corporation of Canada (R. 1372, 1378). The manager of the Pool, Brian McConnell, investigated the matter (Def. Ex's 151, 152, R. 3256-60) and informed Zenith (R. 1314) that in order to continue this business in Canada, Zenith would be required to sign the Pool's standard package license (Def. Ex. 124C, R. 3053) which did not permit importation (R. 1332) and that Zenith would have to manufacture in Canada (R. 1332) any products it intended to sell there. The Pool manager further informed Zenith that it was infringing at least one of Hazeltine's Canadian patents (R. 1332, Def. Ex's 153, 154, R. 3261, 3263) and that Hazeltine's patents, as well as all of the other patents in the Pool, with the exception of those owned by Westinghouse and General Electric Company, could not be licensed for importation (R. 1333). With respect to the latter two companies, McConnell stated that they had instructed the Pool not to refuse to license their patents for importation (R. 1332). The notices to "importers, vendors or users of radio and television receivers" warning them not to purchase imported sets continued to be run by the Pool despite protests by Zenith

(R. 1492, Def. Ex. 138, R. 3121-24). Shortly after the aforesaid demand made on Zenith by the manager of the Canadian Pool, the instant suit was filed (R. 1338).

XXXI. Hazeltine before entering into its exclusive arrangement (Def. Ex. 118, R. 2887) was fully aware of the purpose and the policy of the Pool to prevent the export of American made receivers into Canada (R. 1310-11, Def. Ex. 172, R. 3377-8) and has worked very closely with Canadian Radio Patents Limited in its licensing activities (Def. Ex's 175-178, R. 3390-93) and its campaign against importation from the United States (Def. Ex's 174-178, R. 3381-3393).

XXXII. The proofs establish as a fact that in the circumstances of this case the Canadian Patent Act does not require the Pool to refuse to license importation, as contended by plaintiff. Nor does the Act penalize in any way a patentee who licenses for importation where, as in this case, there is being carried on extensive manufacturing in Canada under its patents (R. 1628-45, 1735-40, Def. Ex's 163-8, 173, R. 3308-26, 3379-81, Z. R. 605).

The Australian Pool.

XXXIII. The dominant electronics company in Australia and its controlled territory is and for many years has been Amalgamated Wireless (A'sia) Limited (referred to as AWA) (Z. R. 202). A number of the same companies involved in the English and Canadian cartel arrangements set up a patent pool in Australia (Def. Ex. 196, R. 3720) identical in principle and purpose to the British and Canadian Pools (Def. Ex. 213, R. 3757-63). The patents of all of the conspiring companies funnel into the Pool which is known as Australian Radio Technical Services and Patents Company Pty. Limited (commonly called ARTS). The patents flow into ARTS through AWA, Standard Telephone and Cables Pty. Ltd., N. V. Philips Gloeilampenfabrieken,

Electric and Musical Industries Ltd. (owning Marconi's and other rights for Australia), Pye Ltd. and Neutrodyne Proprietary Limited (Def. Ex's 181-187, R. 3554-3623). Neutrodyne is a controlled subsidiary of Hazeltine; the latter company owns seventy percent of its stock (R. 1174).

XXXIV. Under an exclusive license agreement dated September 11, 1928 (Def. Ex. 180, R. 3549), but still in full force and effect (R. 1198), Neutrodyne is authorized to place all inventions and patents of Hazeltine into the Australian Pool and is required to see to it that all of the requirements, restrictions and provisions of the standard package license of Hazeltine are contained in any pooling license issued thereunder (R. 3551). Sub-licensing rights, existing and future, under all of Hazeltine's inventions have been granted the Australian Pool under this arrangement for 35 years (Def. Ex's 184-187, R. 3601-24) and have been the subject of the only form of license agreement issued by the Pool, a standard package license not referring to any particular patent or invention but to all of the rights of all the conspiring companies (Def. Ex's 189, 190, 191, 192, 193, 194, 195, R. 3642, 3654, 3659, 3672, 3685, 3699, 3711). A standard Pool license imposes the restrictions necessary to effectuate the division of territories involved in the overall arrangements. It requires the licensee to agree not to export or import (Def. Ex's 189, 191, 194, 195, R. 3644, 3660, 3701, 3713) or sell or offer for sale in Australia any radio or television receiving apparatus not manufactured in Australia. Hazeltine has been fully aware of the Pool's plan and policy not to license for importation and has cooperated with and approved the operation of the Pool with respect to all the Hazeltine Australian patents (Def. Ex's 197-203, 204-207, 208-212, R. 3726-42, 3743-47).

XXXV. The standard package form of Hazeltine license covering all patents (R. 2205, 2294) subject to licensing by the Pool and requiring royalty payment whether or not any

such patent is used (R. 2207, 2295) in the licensed apparatus, is employed by each Pool referred to in these findings. (In England R. 2533-37, 2551-54, 2567-69, 2578-81, 2589-92, 2601-04, 2613-16, 2624-27, 2635-38; In Canada R. 2920-23, 2935-36, 2967-71, 2992-96, 3053-57; In Australia R. 3627-32, 3642-46, 3659-62, 3672-76, 3685-89, 3699-3703, 3711-15) and is also used by Hazeltine in the United States in order to prevent attacks by licensees (R. 2219, 2304) on any of the patents of the participating companies in any of the markets covered by these findings.

Damages Sustained by Zenith.

XXXVI. The foreign commerce of Zenith has been drastically curtailed by the patent Pools in England, Canada and Australia (R. 1379-83, 1387-88, 1450-52). The damages Zenith has sustained were estimated by experienced officials (R. 1379, 1450-51) of Zenith, thoroughly familiar with the business problems and sales potentials in the markets involved. They determined the approximate damages sustained by a thorough study of each of the markets involved (R. 1450) and all relevant factors including tariffs, shipping costs and manufacturing problems (R. 1451). Zenith's foreign commerce has been damaged by the Pools in the following amounts during the 4-year statutory damage period:*

* The damage figures with respect to England and Australia reflect the amendment of Finding of Fact XXXVI entered by the District Court on December 13, 1965 (R. 4161).

Canada		
Television	$5,826,896	
Radio	470,495	(Def. Ex. 220, R. 3905, 1439-40)
England		
Television	4,312,924	
Radio	745,102	(Def. Ex. 220, R. 3905, 1436-40)
Australia		
Television	223,508	
Radio	24,952	
Total	$11,603,877	(Def. Ex. 220, R. 3905, 1438-41, 4161)

Conclusions of Law.

1. The court has jurisdiction to determine the anti-trust issues under the provisions of the Act of Congress approved July 2, 1890, entitled "An Act To Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act.

2. Plaintiff's demands on defendant coupled with the bringing of this suit and the threat to bring other suits on other patents constitute an illegal effort to coerce Defendant into signing the Hazeltine package license.

3. The policy of plaintiff, reflected in the demands made on defendant and action taken against it, was to grant no license unless under all of its hundreds of patents for a fixed royalty, is one of unlawful coercion contrary to public policy.

4. The reward sought by plaintiff from defendant for inventions to be licensed in no way related to the quality of the individual patents and under the package license each patent drew strength from the others, thus unlawfully extending the monopoly of each.

5. Plaintiff's offer to license its patents individually but at royalty rates far in excess of the package rate was

never an alternative to its controlling policy to grant defendant a license only under all of its patents. Rather, it was proposed by Hazeltine in the later stages of its negotiations in the instant case to cloak the harshness of the original demand by seemingly meeting the request of defendant in that regard. Although it may be said that the Hazeltine proposals on the surface were offers to treat of individual patents, the design was quite apparent—to force by unlawful coercion the acceptance of unwanted patents. This constituted an illegal extension of the patent monopolies. Whatever may be the asserted reason or attempted justification of Hazeltine, its efforts to compel defendant to accept a package of patents involved the use of one patent or group of patents as a lever to compel the acceptance of a license under others. Such a licensing scheme under applicable decisions of the Supreme Court is illegal and constitutes a misuse of the patents involved.

VI. There is a further feature of Plaintiff's licensing practices that in and of itself constitutes an illegal attempt to extend the patent monopolies. The license agreement, whether it be under a single patent or under Hazeltine's entire patent package, requires the payment of royalties in large sums for a period of five years on the entire production of the licensee whether or not any licensed patent is employed in any way in the licensee's products. Plaintiff's demands that royalties be paid on admittedly unpatented apparatus constitute misuse of its patent rights and plaintiff cannot justify such use of the monopolies of its patents by arguing the necessities and convenience to it of such a policy. While parties in an arms-length transaction are free to select any royalty base that may suit their mutual convenience, a patentee has no right to demand or force the payment of royalties on unpatented products.

VII. The defense of misuse asserted by defendant is a valid one.

VIII. Every act in furtherance of a general plan to restrain trade and commerce, foreign or domestic, in violation of the Sherman Act, is illegal regardless of whether such act or acts when standing alone and absent conspiracy could be found to be legal.

IX. It is fundamental that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of conspirators. Acceptance of an invitation to participate in a plan, the necessary consequence of which, if carried out, is to restrain commerce, is sufficient to establish a conspiracy under the Sherman Act. Knowledge of a scheme that illegally restrains trade and participation in the plan with such knowledge is all that is required to establish a conspiracy under the antitrust laws and prior agreements need not be shown to have been made between each and all of the conspirators in order to establish a violation of the Sherman Act.

X. The combinations represented by the patent pools in Canada, England and Australia had as their express purpose the prevention of importation into those markets of radio and television apparatus made in the United States and other countries. Hazeltine knowing of the restrictions against imports imposed by those Pools nevertheless chose to permit its patents to be used in furtherance of the scheme and thereby obtained a substantial share of the Pool's income. It thereby became a co-conspirator and legally liable for all the acts of the Pools and its members performed in furtherance of their patent licensing plan to divide markets and prevent competition from imported sets.

XI. Hazeltine's method of placing its patents in the foreign pools—the use of exclusive license agreements either directly with the Pool as in Canada or through a pool member, as in England, or through a subsidiary, as

in Australia—is the traditional means employed in the formation of illegal cartels and it is no defense to say that the particular exclusive licenses to which Hazeltine was a party did not in and of themselves impose the illegal restriction. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts but only by looking at it as a whole.

XII. Hazeltine's defense that it had no intent to restrain trade and that it participated in the Pools for business reason has no legal validity. If good business reasons and expressions of good intent would serve as a defense for restraining trade, the Sherman Act would be rendered impotent and would afford no aid to the free flow of commerce.

XIII. Hazeltine's claimed defense that conspiracies by American companies with companies abroad are governed solely by foreign law and are not violative of the Sherman Act has no legal validity. It is well established that a conspiracy to restrain the domestic or foreign commerce of the United States to which any American company is a party violates the Sherman Act irrespective of the fact that the conduct complained of occurs in whole or in part in foreign countries.

XIV. By virtue of its arrangements in connection with the Pools in Canada, England and Australia, Hazeltine has violated Section 1 of the Sherman Act.

XV. Counterclaimant has established that it has been injured in its business by virtue of the unlawful conspiracy and acts performed in furtherance thereof. As a co-conspirator Hazeltine is liable for those damages.

XVI. Counterclaimant is entitled to the injunctive relief sought in the counterclaim.

R. B. AUSTIN,
Judge, U. S. District Court.

Dated: January 25, 1965.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

Nos. 15246, 15247, 15563, 15564.

September Term and Session, 1967.

HAZELTINE RESEARCH, INC.,
Plaintiff and Counter-Defendant, Appellant,

15246, 15563 v.

ZENITH RADIO CORPORATION,
Defendant and Counter-Claimant, Appellee.

HAZELTINE CORPORATION,
Plaintiff and Counter-Defendant, Appellant,

15247, 15564 v.

ZENITH RADIO CORPORATION,
Defendant and Counter-Claimant, Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

December 19, 1967.

Before CASTLE, KILEY and CUMMINGS, *Circuit Judges.*

KILEY, *Circuit Judge.* This infringement suit was begun by Hazeltine Research, Inc. (HRI) in November, 1959, against Zenith Radio Corporation for patent infringement. In May, 1963, Zenith counterclaimed, seeking treble damages for HRI's violation of the antitrust laws in the

use of patents. The district court entered judgments[1] against HRI and Hazeltine Corporation, its parent, on the issues of validity, infringement, patent misuse and antitrust violations, and awarded treble damages of $34,961,631 to Zenith on its counterclaim. HRI has appealed from the judgments against it. Hazeltine Corporation has made a motion to vacate the judgments against it and has filed provisional appeals from the judgments.

We vacate the judgments against Hazeltine Corporation. We affirm the district court judgment holding the patent in suit invalid. We affirm the judgment of the district court for Zenith, and against HRI, with respect to its domestic patents for treble the amount of $50,000, or $150,000. We reverse the judgments for treble damages based upon HRI's alleged participation in foreign patent pools in violation of the antitrust laws. We modify in some respects the injunction issued by the district court. And we remand for the sole purpose of entry of a judgment against HRI and for Zenith in the amount of $150,000 and entry of a modified injunction in accordance with this opinion.

Hazeltine Corporation's Motions.

Under Rule 15(f)[2] of this court Hazeltine Corporation has made motions to vacate the judgments against it, upon

1. On April 5, 1965, the district court entered judgment against HRI and Hazeltine Corporation on the issues of infringement, validity, patent misuse and on the issues raised by Zenith's counterclaim relating to patent misuse and the Canadian patent pool. The damages as trebled amount to $150,000 for patent misuse and $18,892,173 for the alleged antitrust violations arising from participation in the Canadian patent pool. On December 13, 1965, the district court entered judgment against HRI and Hazeltine Corporation in the amount of $15,919,458 as treble damages for alleged injuries to Zenith because of allegedly unlawful conduct of English and Australian patent pools.

2. Rule 15(f) of this court provides that a substantial jurisdictional question may be raised by motion for determination before the hearing on the merits. The questions raised in the motions are identical.

Zenith's counterclaim, as void for want of jurisdiction over its person. We ordered that the motions be taken with the case on the full record.

Hazeltine Corporation is sole owner of HRI. The Corporation is engaged primarily in the business of research, development and manufacture of electronic equipment for military and commercial use. HRI is engaged primarily in research, development, ownership and licensing of United States patents relating mainly to radio and TV. The Corporation was not named as a party in the counterclaim, was not served with process, did not participate in the trial and filed a "special appearance" contesting entry of judgment after the district court adopted findings of fact and conclusions of law naming the Corporation as a party for the first time.

The district court found that "the parties stipulated that for the purposes of this litigation Hazeltine Research, Inc. and its parent, Hazeltine Corporation would be considered as one entity operating as a patent holding and licensing company, engaged in the exploitation of patent rights in the electronics industry in the United States and in foreign countries." The court made no other findings relating to "piercing the corporate veil," and our reading of the colloquys between counsel and the court leads us to the conclusion that the stipulation was the principal if not the only basis for binding the Corporation in the judgments.

Hazeltine Corporation contends that the trial court had no jurisdiction to enter judgment against it because it was not served and was not a party; that in its counterclaim Zenith recognized the separate identities of HRI and Hazeltine Corporation and sought judgment against counter-defendant HRI alone; that Hazeltine Corporation did not defend against the charge; that the stipulation, drawn by Zenith and signed by Zenith and HRI, did not justify binding the Corporation in the judgments sought; that before

and during the trial Zenith indicated no construction of the stipulation as making the Corporation a party and did not move to amend the pleadings by naming the Corporation; that the findings of January 25, 1965, indicate no intention that the judgments would run against the Corporation; that it learned Zenith would seek to enforce judgment against it the day following entry of findings; and that the first suggestion in the district court of being bound came only in the proposed form of judgment submitted by Zenith on March 19, 1965.

Zenith relies upon (a) the stipulation, (b) Hazeltine's disregard of the "corporate fiction" during discovery beginning in June, 1960, by responding to subpoenas duces tecum against the Corporation without question, by submitting to deposition of the Corporation at its offices in New York with production of files of domestic and foreign patents and by the obedience of the Corporation to court orders, and (c) the dual office of plaintiff's attorney Dodds as officer of both HRI and the Corporation, certain correspondence during 1963 and "control" of the litigation by the Corporation. It relies too upon a finding of fact proposed by plaintiff:

> 8. It is stipulated that, for the purposes of this Action, Hazeltine [HRI] and H. C. may be considered a single legal entity to avoid the issue of whether or not it is appropriate to "pierce the corporate veil," but it is proper to consider the separate and unrelated activities of the two companies separately.

It further depends upon proposed findings of fact and conclusions of law favoring the Corporation. On the basis of all this, Zenith contends that Corporation is the alter ego of HRI and that the finding "piercing the corporate veil" was not clearly erroneous.

The general principle controlling this case was well stated

by the Supreme Court in *Hansberry* v. *Lee*, 311 U. S. 32, 40-41 (1940):

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States . . . prescribe . . .; and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.

Since Hazeltine Corporation was neither named nor served, the sole basis for liability on the judgment is the theory that HRI is its alter ego. We cannot say that the Corporation was "adequately represented" here on the alter ego issue. 311 U. S. at 42-43. The resolution of the alter ego issue can be made only after an adversary determination of the facts involved. This court cannot make an initial determination of these facts, and the district court did not do so.

The issue became apparent in the district court only after the district court had filed its findings and conclusions. And at no time during the trial did the Corporation have an opportunity to show that it was not the alter ego. The Corporation's appearance to argue the issue after the trial was not sufficient opportunity to be heard under the due process clause.

Zenith's contention that HRI adequately represented the Corporation's interests on the alter ego issue begs the question. On this issue, only the Corporation itself could have protected its own interests.

We think *Merriam* v. *Saalfield*, 241 U. S. 22 (1916), refutes Zenith's contention that control of the litigation

by Hazeltine Corporation made it amenable to joinder after findings of fact and conclusions of law were adopted without service of process. In *Merriam* it was clear that Ogilvie had controlled the defense for Saalfield, the defendant named in the original suit. Here the facts are only that Dodds, attorney for plaintiff HRI, was an officer and a counsel for the Corporation. There is no showing that he was authorized to act for the Corporation. We find no basis for joining the Corporation because of its claimed participation in the trial.

The stipulation relied upon by Zenith and the district court was signed only by the "parties" to the counterclaim, and the Corporation was not a party. And there is no showing that the Corporation authorized HRI's representative to sign on its behalf.

We see no reason why the Corporation's disclosures of its files and obedience to subpoenas in connection with HRI's infringement suit should bind the Corporation as a party to a subsequent antitrust counterelaim in which it is not joined as a party.

No case cited by Zenith is applicable to the facts here. The cases cited assume there was such control of HRI as to render the latter the Corporation's agent (and in our view there is no showing of that fact on the record); and that HRI and the Corporation are the same identity, an alter ego relationship unwarranted on this record. Zenith had the burden of establishing clearly that Dodds had authority to represent the Corporation in entering the stipulation prepared by Zenith or that the Corporation was in fact the alter ego of HRI. We hold Zenith did not meet the burden.

The judgments against the Corporation are void and must be vacated.

The Patent Issues.

The HRI patent in suit, 2,647,648, (648), and Zenith's accused device, are both circuits used in TV receivers. The pertinent claims in issue have the purpose of automatically adjusting the variations in strength of signals transmitted from TV stations to receivers so as to maintain a uniform picture in the receiver. The district court denied recovery of damages for Zenith's alleged infringement on the ground that the claims in suit were invalid, that Zenith's device did not infringe and that HRI's misuse of its patent precluded it from recovery. The claims were found invalid on the alternative grounds that they defined no patentable invention over prior art and that the invention disclosed was in public use more than one year prior to October 8, 1949, when HRI "amended" its original application so as to include the claims before us.

The important question before us is whether the district court properly decided that the 1949 "amendment" was not entitled to the 1946 filing date of HRI's original application. If the district court properly decided this question, its decision of invalidity is right. We hold that the record viewed as a whole substantially supports the district court's finding that HRI was not entitled to the earlier filing date and that the claims in suit were invalid. We express no opinion upon the other issues bearing upon the infringement claim.

The record discloses that the original application was filed January 25, 1946, that RCA published a bulletin March 15, 1949, disclosing different means of achieving the purpose of the claims in HRI's original patent, and that HRI's 1949 "amendment" discloses essentially the same means. The district court found that HRI's 1949 application sought a continuation of the original application, but that there was no basis in the original claims

which justifies relating the 1949 claims to the original. These findings are challenged by HRI. The court further found that the RCA bulletin in 1949 motivated HRI's "continuation application."

In disposing of HRI's challenge of the district court's finding that there was no basis in HRI's 1946 application for allowing the 1949 claims the benefit of the 1946 filing date, we think it is necessary to briefly outline the basic principles of TV transmission and reception in order to understand the nature and function of the part of the TV receiver subject of the claims in suit.

In the transmission of a TV program to a receiving set, the camera image is rapidly scanned, as in a person's reading, by an electron beam sweeping from side to side, with each sweep progressively lower until the entire image is scanned. The intensity of the beam varies with the brightness of the point of the image being scanned. The varying electric current thus created is used to generate radio waves with corresponding intensity variations. The transmitted radio waves are received in the TV set, transformed into electric current with corresponding intensity variations, amplified, and used to vary the intensity of an electron beam scanning the TV screen, thus reproducing the image.

The beam in the TV set must scan the screen in exact synchronization with the beam in the camera. To accomplish this, synchronization pulses are included in the transmitted radio wave, representing the end of each line and the end of the field or complete picture. In the receiver, these pulses are used to govern the timing of the scanning operation.

"Sync" pulses are also used in another manner in the receiver. The intensity level of the pulses is higher ("blacker," since high intensity represents black and low

intensity represents white in the signal) than the intensity level of the rest of the radio wave, and its intensity at the time of transmission is a known factor which is constant in all transmissions. The strength of a particular station's over-all signal can therefore be determined by the intensity level of the "sync" pulse. The picture tube of a TV set must receive a signal with a reasonably uniform range of intensity to perform properly. Thus, the signals of weaker or distant stations or those affected by atmospheric conditions must automatically receive more amplification than stronger signals.

The basic principle of the patent in suit, 648, involves using the intensity level of the "sync" pulses in a particular signal to generate a control voltage which in turn controls the degree of amplification needed to produce reasonable uniformity in reproducing the picture transmitted. For example, the signal of a strong nearby station will include high intensity "sync" pulses, and, through the device in suit known as an AGC circuit, these pulses will be used to generate a control voltage which in turn will automatically reduce the amount of amplification.

In the fall of 1945 when HRI began work toward perfection of its device, the basic method for adjusting the strength of signals reaching a TV receiver by the use of the "sync" pulse to produce a control voltage in an integrating load circuit was well known. This feature is used in the patent in suit and the accused device, and in other AGC devices.

In 1945, however, the AGC circuit in use was fed with current supplied from the video detector part of the receiver. This process did not produce the desired sensitivity of adjustment and although by adding a DC amplifier the desired sensitivity would be gained by increasing the voltage fed into the AGC circuit, this would require

an additional stage of amplification in the receiver which was not commercially desirable. HRI's work in 1945 was aimed at achieving the desired sensitivity of the AGC circuit by obtaining the signal voltage used in the AGC circuit from the video amplifier rather than the video detector. This would increase the voltage fed through the AGC circuit and increase the circuit's sensitivity without the necessity of an additional amplification stage. The idea was not new, but a major difficulty prevented its being applied in practice: The AGC controlled voltage had to be negative with respect to the ground, but the DC voltage level at the point in the receiver following the video amplifier was positive with respect to the ground.

HRI's original 1946 application disclosed a means of overcoming the above problem and deriving the signal voltage from the video amplifier, for use in the AGC circuit. The video amplifier was connected in a series circuit with a diode rectifier, a source of alternating current of approximately equal voltage to that at the video amplifier and an integrating load circuit. The aim was to offset the positive polarity of the voltage at the video amplifier so that the AGC circuit would produce control voltage having the required polarity.

HRI's "continuation application" was filed October 8, 1949, and added the claims now in suit which are considerably broader than the original claims, and we think the record justifies the court's inference that the additional claims were motivated by the RCA bulletin of March 15, 1949, which disclosed a different means of deriving voltage from the video amplifier for the AGC circuit. HRI's additional claims were designed to cover the RCA disclosure. The Patent Office issued HRI's patent in suit, 648, containing the 1949 claims, on April 3, 1951.

In 1949 RCA means and the HRI claims in suit, unlike the means disclosed in HRI's 1946 application, the video

amplifier is connected to a grid controlled vacuum tube. This tube has three types of electrode components; a cathode, an anode, and one or more grids. The grid is placed between the cathode and anode to control the flow of electricity between them. Electricity normally flows from cathode to anode when the anode has a positive voltage with respect to the cathode. If the grid is made negative with respect to the cathode it acts as a gate to control the current flowing between cathode and anode. As the grid is made more negative with respect to the cathode, the flow of electricity between cathode and anode is reduced and if the grid is made sufficiently negative the flow will be cut off.

The grid in the RCA grid control tube is connected to the video amplifier and a source of alternating current is connected with the anode, to which the alternating current supplies positive pulses. When the grid is positively charged by the video amplifier and the anode is positively charged by the alternating current, electrons will flow from the cathode to the anode and be thus fed into the AGC circuit where the required control voltage will be produced to adjust the strength of transmitted signals picked up by the receiver.

The district court had ample support for finding substantial differences between HRI's original disclosures in 1946 and the claims sought by the 1949 application. The devices clearly operate differently. Unlike the RCA device, HRI's original device provided for a series circuit connection between the video amplifier, a diode, a source of alternating current and an integrating load circuit. In HRI's original claims the alternating current, unlike RCA's, must be set at a specific level to offset positive voltage at the video amplifier. HRI's original claims utilize a diode. RCA's uses a grid control tube. HRI's original claims require offsetting positive voltage at the video amplifier, but RCA's device uses that positive voltage to control the

flow of current to the integrating load circuit. The HRI device originally claimed meets the same need as RCA's, but by entirely different means. It is significant that the HRI device originally disclosed has never been incorporated in any TV receiver sold in the United States, while RCA's device, or similar devices have become standard features in most TV receivers.

Having found no error in the court's finding that the claims in suit constituted new matter, the conclusion of invalidity follows. The continuation, under 35 U. S. C. Sec. 120, may not be used to permit HRI to claim new material not disclosed in the original application and not invented by it so as to cut off intervening rights. The disclosures made by RCA in March, 1949, were either the property of RCA or of the public and could not be appropriated by HRI. *C & N W Railway Co.* v. *Sayles*, 97 U. S. 554 (1878); *Schriber-Schroth* v. *Cleveland Trust Co.*, 305 U. S. 47 (1939).

We need not pass on the issue of infringement.

The Misuse Issues.

Although we affirm the district court's judgment of invalidity, we must nevertheless decide the issue of patent misuse, since Zenith's counterclaim sought to recover, and had judgment for, damages as a result of HRI's alleged patent misuse.

The district court found that Zenith's five year "standard package license" (including over 500 patents) from HRI was about to expire in 1959; that Zenith rejected HRI's offer of renewal on the ground that it needed no license; that HRI then asserted infringement by Zenith of four monochrome (black and white) TV patents and offered a license under a formula providing for any one patent at a royalty rate of 50% of the package rate,

for any two at 80%, and for any "three or more" at 100%, with rates based upon Zenith's total production, whether the patents were used or not; that Zenith refused the offer, and this suit followed; and that under the circumstances, this offer was "an attempt by economic coercion to force the taking of the package."

The court found that after suit was filed HRI informed Zenith it was infringing nine color patents and again offered the package license; that Zenith again refused to accept; that in April, 1962, HRI offered to license (1) use of the nine color patents at an annual royalty rate of $435,000 or (2) use of all color patents issued and applied for at an annual rate of $500,000 or (3) the package of all monochrome and color patents at an annual rate of $150,000; and that Zenith refused.

The court further found that in March, 1963, before trial, HRI made a final offer "obviously" intended to force the package license upon the unwilling Zenith; that under this offer the options were (1) payment of $275,000 per year in royalties for use of nine color patents, (2) payment of $300,000 per year for use of all extant color patents, (3) payment of $310,000 for all extant and future color patents, or (4) payment of $200,000 for the package of all patents, color and monochrome, extant and future, at an annual maximum of $200,000; and that the only alternative to accepting one of these options was costly infringement litigation. The court found that the only practical answer to the dilemma was acceptance of the standard package under the compulsion of economic coercion.

The district court concluded that the demands upon Zenith were unlawful economic coercion which, coupled with this suit and threats of other suits, constituted an illegal attempt to force acceptance of the standard package and a misuse of patents to unlawfully extend HRI's

patent monopoly, and awarded damages based on Zenith's expenses in defending this suit and in investigating other patents asserted.

We think there is substantial evidence in the record to support the findings with regard to the misuse inherent in HRI's 1962 licensing offer. Zenith's witness Crotty testified to the offers, substantially as found, from HRI representatives. HRI's president testified that Crotty could have read HRI's proposal the way Crotty had read it and admitted the offer of a package at a substantially lower rate than the "total" of the fewer than all rates. And HRI's attorney agreed with the district court that if the figures were right and if a licensee could get the package for considerably less than for nine patents an inference could be drawn that "somebody" was trying to sell a package rather than individual patents. HRI's claim of innocent mistake in drafting the offers is refuted by inter-office memos including one where patent counsel had informed his superior that the offers risked a charge of patent misuse and were apt to be viewed as "just what we intended—a transparent attempt to force them into package."

The substance of HRI's contention is that a licensor can offer to license any number of patents less than all in the package for the same total royalty, so long as that royalty is reasonable for any one of the patents and so long as he does not refuse to license individual patents. It relies upon the Supreme Court's decision in *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827 (1950), and this court's decision in *Hazeltine Research, Inc.* v. *Avco Mfg. Corp.*, 227 F. 2d 137 (7th Cir. 1955), *cert. denied*, 350 U. S. 987 (1956). The holding in *Automatic Radio* was that it is not *per se* misuse of a patent to measure the royalties by a percentage of the licensee's sales when the licensee is engaged in a related enterprise.

The Court refused to consider the package licensing claim there, however, because there was nothing in the record to support it. 339 U. S. at 827. And in *Avco* we held that the record did not compel a finding of coercion. Neither of those cases is in point here.

In *American Securit Co.* v. *Shatterproof Glass Corp.*, 268 F. 2d 769 (3d Cir.), *cert. denied*, 361 U. S. 902 (1959), refusal to license individual patents was held to be misuse *per se*. We see little difference between outright refusal to license less than a package and the economic coercion of HRI found, with reason, by the district court here. See Report of the Attorney General's National Committee to Study the Antitrust Laws 239-240 (1955); Diggins, The Patent-Antitrust Problem, 53 MICH. L. REV. 1093, 1105 (1955).

The district court concluded erroneously that HRI's 50% for one-80% for two-100% for three or more patents formula offered Zenith in 1959 was unlawful economic coercion. This court has not considered the formula *per se* unlawful. *Apex Electrical Mfg. Co.* v. *Altorfer Bros.*, 238 F. 2d 867 (7th Cir. 1956). Actually the formula allowed licensees to save money by taking licenses of less than three patents. Eight TV manufacturers took licenses for only one patent under the formula, the one here in suit. There were only three HRI patents in general use in 1959 and therefore the formula appears reasonable in light of commercial realities. Zenith under the offer was free to take a license only for what it needed. Although discussion of a license between Zenith and HRI originally involved four patents, the discussion narrowed to the patent in suit, Zenith's rejection of the offer, and HRI's infringement suit.

We think our conclusion affirming the trial court's determination of misuse in conjunction with the 1962 offer

is strengthened by the Supreme Court's decision in *United States* v. *Loews, Inc.*, 371 U. S. 38, 54-56 (1962), where it approved the district court's injunction against economic coercion similar to that here in a case involving refusal to "book" less than a package of films for television use.

There is no merit in HRI's contention that the misuse of its patents, including the one in suit, furnishes no basis for an award of treble damages. The requisite anti-competitive effect is presumed where the tying product is patented. *International Salt Co.* v. *United States*, 332 U. S. 392 (1947). See *United States* v. *Loews, Inc.*, 371 U. S. 38, 45 (1962). Zenith's expenses in defending the infringement suit brought pursuant to HRI's antitrust violations are a proper subject of threefold recovery. *Dairy Foods, Inc.* v. *Dairy Maid Prod. Cooperative*, 297 F. 2d 805, 809 (7th Cir. 1961).

The district court's determination of Zenith's $50,000 basic damages for HRI's patent misuse represented, according to the findings, expenses incurred in Zenith's preparation for the 1963 trial of HRI's infringement suit and in investigating HRI patents asserted against Zenith. The $50,000 figure is not here, and as far as we are informed by HRI, was not challenged at trial. In view of HRI's unlawful conduct commencing in 1962, and the size of the record of trial of the infringement issues, we cannot say the basic damages are so unreasonable that we must set aside the allowance. We affirm the treble damage judgment of $150,000.

The Antitrust Issues.

Zenith's treble damage counterclaim was filed May 22, 1963, alleging violation by HRI of the Sherman Act, 15 U. S. C. Secs. 1 and 2, by its alleged participation in con-

spiracies that unlawfully prevented Zenith from exporting its United States manufactured products into Australia, Canada and England. Zenith was granted injunctive relief and treble damages on the counterclaim in the amounts of $745,380 as to the Australian market, $18,892,173 as to the Canadian market, and $15,174,078 as to the English market. The judgment followed for $34,811,631.[3]

HRI challenges Zenith's judgment on several grounds. However, we think the crucial question is whether the district court's finding that Zenith was in fact damaged by the pools in the three countries during the four year damage period[4] preceding the filing of the counterclaim is clearly erroneous. FED. R. CIV. P. (52a). We agree with HRI that Zenith failed to sustain the burden of proving the essential *fact* of damage in the relevant period. We need pass on no other contention, therefore, in reversing the judgment on the counterclaim.

Zenith had the burden at the trial of showing an "injury to [its] business," 15 U. S. C. Sec. 15, by proving the unlawful conspiracies and the *fact* of damage as a proximate result of the alleged unlawful conspiratorial activities. *Story Parchment* v. *Patterson,* 282 U. S. 555; *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U. S. 251; *Continental Ore* v. *Union Carbide,* 370 U. S. 690.

The district court concluded that the alleged conspiracies had as their express purpose prevention of importation of TV apparatus made in the United States, that HRI by participating in the conspiracies had violated the Sherman Act and that Zenith had established that it had been injured in its business as a result of the unlawful

3. The figures for England and Australia were reduced on December 13, 1965, upon further hearing after proofs were reopened.

4. Four years prior to the May 22, 1963, filing date of Zenith's counterclaim 15 U. S. C. Sec. 15b.

activities of the pools. The court's ultimate finding of fact was that "the foreign commerce of Zenith has been drastically curtailed by the patent pools" in the three countries. The court stated that damages had been shown by experienced Zenith officials thoroughly familiar with the business problems and sales potentials in the three markets.

The ultimate finding rests upon subsidiary findings that for "many years" before 1957 Zenith tried to establish distibutorships in Canada but in "every instance" the Canadian distributor was warned to stop handling Zenith products or face expensive litigation; that Zenith sought import licenses but in "every instance" such licenses were refused them; that after the 1957 settlement Zenith began late in 1958 to export to Canada its radio and TV products through Zenith Radio Corporation of Canada; but that the pool demanded that Zenith discontinue the practice and accept a standard package license and manufacture in Canada any products sold there; and that soon after the demand the instant Hazeltine infringement suit was brought.

The Zenith officials whose testimony was relied on by the court were Zenith's president, its vice-president in charge of patents, and its manager of internal auditing and chief financial officer.

A good part of the president's testimony concerned activities of the pools before the settlement of *RCA* v. *The Rauland Corporation,* No. 48 C 1818 (N. D. Ill.), in 1957. In that suit Zenith filed a treble damage counterclaim seeking damages for refusals to license similar to those alleged here, in settlement of which it obtained unrestricted cross-licenses from RCA, General Electric, and Western Electric Company, and in turn gave general releases to those three companies. The president also testified generally that after this settlement Zenith hoped to be able to compete freely

in Canada with its competitors, but that unlawful pool activity continued into the damage period. His testimony was that because of the similarity between the Canadian and United States markets, he was convinced that Zenith, but for the "clouds and difficulties" caused by the pool's refusal of a license permitting Zenith to export to Canada, would have achieved the same percentage, 20% of the Canadian market as it enjoyed in the United States market, and would have also captured 5% of the English market and 2% of the Australian market.

Zenith's vice-president gave his opinion corroborating the statement that in a market free of license restrictions Zenith would have the percentage shares that the president testified to.

Zenith's third witness took the percentages testified to by the president and vice-president and, through the use of a chart, calculated "lost sales and lost profits" based on past profit and cost data.

No specific findings were made with regard to how the alleged conspiracy prevented sales by Zenith in Australia. We see no necessity of discussing at great length Zenith's failure to prove the *fact* of damage with respect to the Australian market, since there is no testimony that could reasonably support a finding of *fact* of damage there. Until April, 1960, Australian government regulations prevented Zenith's selling radio and TV sets in that country. Zenith's case rests on the testimony of its officers that conversations between Zenith employees and Australian businessmen who were not members of the patent pool led it to believe that it could not obtain a license to import radio and TV receivers into Australia after 1960. There is no evidence that Zenith ever attempted to obtain a license from the Australian pool, nor is there any proof of use by the Australian patent pool of restrictive license forms to prevent import. Indeed, during the post-1960 period a large

number of low priced Japanese radio and TV sets were sold in Australia. Actually, high import duties and shipping costs posed a formidable barrier to Zenith sales. There is no evidence to warrant the inference that Zenith intended to or was prepared to enter the Australian market. *Triangle* v. *National Elec. Prod. Co.*, 152 F. 2d 398; *Volasco Prod. Co.* v. *Fry Roofing Co.*, 309 F. 2d 383, 395.

We also conclude that Zenith failed to prove the *fact* of damage with respect to the English market. A World War II embargo prevented Zenith from importing its products into England until June, 1959. At that date all basic radio patents had expired, and Zenith had no difficulty in doing radio business in England. The difficulty Zenith had in the English market with its TV products cannot reasonably be attributed to the activity of an unlawful conspiracy in that country. Significant barriers other than patent difficulties operated to prevent sales of Zenith TV receivers in England. Zenith sets manufactured in the United States operated on 525-line and 625-line scanning signals. The English standard was a 405-line signal until changed to 625-line after the damage period. Zenith sets sold in England would be in competition with substantially lower priced British sets. There was no testimony that the British pool, during the damage period, had threatened or filed suit on any patents.

We think it is unreasonable to infer that Zenith intended to and was prepared to enter the English television market during the damage period. The only reasonable inference is that it was waiting for a change in English standards to a 625-line system. Zenith was not aided, in showing loss of probable profits, by the testimony that its man in England could adjust Zenith sets to the English standard "with a screwdriver in the back of the shop in a few minutes."

We hold that the finding of the district court that Zenith had been injured in its business by the activities of the al-

leged unlawful conspiracies in Australia and England is clearly erroneous.

Zenith's president's testimony with respect to the Canadian market can be considered as some slight evidence of the *fact* of damage, being more specific than with respect to the other markets. He testified that in 1958 he complained to the Canadian pool about its advertisement in a Canadian trade journal addressed to television and radio dealers in Canada. He charged that the advertisement was false, and was damaging to Zenith's business, because it contained threats of infringement suits which were calculated to discourage distributors from handling Zenith products. This advertisement, he testified, was typical of threats made during the damage period. During his testimony, a letter, written during the damage period by a Zenith distributor in Canada with respect to threats made by the pool to a Motorola dealer, was read into the record.

Despite this testimony, the fact remains that during the damage period Zenith sold more than 65,000 radios and nearly 60,000 TV sets in Canada. It did not seek a pool license after 1953, claiming throughout the period that it had unrestricted cross-licenses as a result of the 1957 settlement which rendered pool licenses unnecessary. Zenith's president could not recall any specific threat of litigation over radios alone. Zenith's subsidiary in Canada has not been sued or threatened with suit for importing radios into Canada since 1957. There was testimony that Zenith had made no separate effort to import radios into Canada despite the fact that all basic radio patents had expired before the end of the damage period. There was no showing that the 1958 advertisement had any adverse effect on Zenith's sales.

No Canadian distributor was called as a witness by Zenith. The letter in 1962 from the Zenith dealer referring to the Motorola threat could imply that no Zenith dis-

tributor had been threatened. Although several of Zenith's United States competitors were doing business in Canada, Zenith made no showing of comparable experience of those competitors in the United States and Canada. Zenith was advised by the pool that it was infringing pool patents in 1959, but continued to export to Canada without any interruption. In 1960 it spent 11% of its Canadian TV sales and almost 13% of its radio sales on advertising. By 1961 it had achieved 5% of the television market, and the decrease in the share thereafter was not shown to have been caused by the pool.

We hold that even though there is some testimony of damage suffered by Zenith in the damage period as a result of pool activities in Canada, we have a firm conviction that the district court made a mistake in inferring from the entire testimony that the essential element of *fact* of damage had been established by Zenith. *Milwaukee Towne Corp.* v. *Loews, Inc.*, 190 F. 2d 561, 566.

Zenith argues that HRI's instant infringement suit is in furtherance of the alleged Canadian conspiracy. There is nothing in the record to show that this suit had any effect to damage Zenith's Canadian business. The record shows that this claim was not taken seriously by the district court.

Zenith relies on this court's decision in *Dairy Foods Inc.* v. *Dairy Maid Prod.*, 297 F. 2d 805, to support its argument that the filing of the instant HRI infringement suit placed it in a dilemma since if the suit was successful it would be forced to take licenses under HRI's domestic patents, thereby losing a defense to any pool claim of infringement of patent counterparts in Canada, and that accordingly it had to curtail its operations there pending the outcome of the infringement suit. The court in *Dairy Foods* was speaking of the dilemma raised by the plaintiff's allegations which it had the burden of proving. In this case Zenith failed to prove what it alleged. As we have stated, the evidence re-

reals no curtailment of Canadian operations but instead indicates extensive sales in Canada as well as heavy expenditures for advertising there. Even if we assumed the continuation of an unlawful conspiracy after the 1957 settlement, into the damage period, the assumpion is of no help to Zenith, under *Highland Supply Corp.* v. *Reynolds Metals Co.*, 327 F. 2d 725, 732, absent proof of the *fact* of damage. Nor does the statement in *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F. 2d 96, 99, that the *fact* of damage need not be direct suppression of trade aid Zenith. The general language of Justice Holmes in *United States* v. *Kissel*, 218 U. S. 601, 607-08, about a continuing criminal conspiracy does not help Zenith since even if the continuous existence of the unlawful conspiracy was, as Zenith claims, a continuous overt act, the *fact* of damage must still be shown. The facts in this case do not resemble those in *Continental Ore* v. *Union Carbide*, 370 U. S. 690, where there was clear evidence of defendant's refusal to deal with the Continental Company, as a result of which it had to drop out of the vanadium business.

We do not agree with Zenith that a Hazeltine attorney admitted at the trial that the existence of the conspiracy was a continuous overt act causing damage to Zenith. The admission was that "if the conspiracy continued" after 1957 there "might have been damage." Neither do we take as an admission to prove the *fact* of damage general statements of a Hazeltine attorney and letters long before the damage period to the effect that in "foreign countries" threats of adversly held patents are "as much of a risk to your business as are tariff restrictions, freight rates, insurance, and the many other impediments to the flow of trade."

In addition to oral testimony Zenith relies upon the 1957 settlement of Zenith's counterclaim in *RCA* v. *The*

Rauland Corp., No. 48 C 1818 (N. D. Ill.), to prove the fact of damage. However, under a well settled rule, *e.g.*, *Domark* v. *Bates Motor Co., Inc.*, 93 F. 2d 522, 526, the settlement of Zenith's suit against RCA, General Electric and Western Electrict constitutes no admission of the fact of damage against Hazeltine. Even if it is true that there were damages prior to the 1957 settlement this does not prove the fact of damage between 1957 and 1963. The 1957 settlement has relevance only so far as the release of future damages given by Zenith in that settlement precludes recovery for damages resulting solely from illegal activities of the Canadian pool prior to September 27, 1957, the date of the settlement.

Zenith relies too upon a "stipulation" of Hazeltine's attorney as to the *fact* of damage to Zenith's business. The attorney stated during testimony of a Zenith official, "I am perfectly willing to stipulate that Zenith has had problems in exporting their radio and television receivers to Canada." We do not read that statement as a concession of the *fact* of damage. In context, the attorney's statement either referred to the period preceding 1957 and not to the pertinent damage period, or to other obstacles to export by Zenith such as tariffs, shipping costs, low priced competition, and technical problems.

For the reasons given, the judgment for Zenith for $34,811,631 upon the treble damage counterclaim is reversed.

The Injunction.

In addition to granting treble damages to Zenith, the district court ordered injunctive relief against HRI's conduct vis-a-vis Zenith in the use of HRI's domestic patents and against its participation in unlawful antitrust conspiratorial conduct.

It follows from our conclusion with respect to the for-

eign patent pools that injunctive relief against "threatened loss or damage" directed at those pools, alleged by Zenith to be unlawful conspiracies, cannot be justified under 15 U. S. C. Sec. 26. Paragraph C of the injunction granted must be stricken.

We agree with HRI that the district court erred in holding the method of computing royalties to be patent misuse. *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827 (1950). Therefore there is no basis for that part of the court's injunction relating to payment of royalties on unpatented products, and we order that it be modified by deleting from paragraph A the words: "or upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent."

We also agree with HRI that paragraph B of the injunction does not comply with the requirement of Fed. R. Civ. P. 65 that it describe the acts restrained in reasonable detail. We order that it be modified so as to (1) give Zenith the benefit only of the same royalty rates as those presently in effect with other licensees, (2) permit licensing of individual patents at rates the sum of which is greater than the package rate so long as the rates for individual patents are not so disproportionate to the package rate as to amount to economic coercion to force the taking of the package, and (3) not to require that comparable royalty rates be given to Zenith for longer periods than they are available to others.

Conclusion.

For the reasons given, the judgment against Hazeltine Corporation is vacated; the district court judgment holding the patent in suit invalid is affirmed; the award in favor of Zenith for treble $50,000, is affirmed; the awards for treble damages based on HRI's alleged participation

in the foreign patent pool are reversed; and the cause is remanded to the district court for the sole purpose of entering judgment in favor of Zenith and against Hazeltine Research, Inc., in the amount of $150,000, striking paragraph C of the injunction, and modifying paragraphs A and B of the injunction in a manner consistent with the view expressed herein.

REVERSED AND REMANDED WITH DIRECTIONS.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago, Illinois 60604.

December 13, 1967

Before

Hon. Latham Castle, Circuit Judge;
Hon. Roger J. Kiley, Circuit Judge;
Hon. Walter J. Cummings, Circuit Judge.

Nos. 15246, 15563
HAZELTINE RESEARCH, INC.,
vs.
ZENITH RADIO CORPORATION,
and
Nos. 15247, 15564
HAZELTINE CORPORATION
vs.
ZENITH RADIO CORPORATION.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER.

The court has fully considered the briefs and appendices filed in these appeals and has heard thorough oral arguments on the issues. Having reached its conclusion, the court now announces its decision and enters judgment in accordance with and for the reasons given in its opinion now being prepared for printing and to be filed forthwith.

We enter the following judgment:

(1) The judgments of the district court against Hazeltine Corporation are vacated for want of jurisdiction over its person.

(2) The judgment of the district court holding Hazeltine Research, Inc.'s patent in suit invalid is affirmed.

(3) The part of the judgment of the district court for Zenith Radio Corporation, and against Hazeltine Research, Inc., with respect to its domestic patents, for treble damages in the amount of $150,000 is affirmed.

(4) The part of the judgment, with respect to foreign patents, for the difference between $34,961,631 and $150,000, or $34,811,631 is reversed.

(5) The injunction is modified by striking from the decree the restraint against Hazeltine Research, Inc. in so far as it is based on Hazeltine Research, Inc.'s alleged antitrust conspiratorial violations with respect to foreign patent pools. We further modify the injunction to some extent with respect to the patent misuse by Hazeltine Research, Inc. in the United States.

(6) And the cause is remanded to the district court for the sole purpose of entering judgment in favor of Zenith against Hazeltine Research, Inc. in the amount of $150,000 and of entering a modified injunction in accordance with our opinion.

It is further ordered by the court that Hazeltine Corporation recover from Zenith Radio Corporation, Hazeltine Corporation's costs in Appeals Nos. 15247 and 15564.

It is further ordered by the court that the costs in Appeals Nos. 15246 and 15563 be divided equally between Hazeltine Research, Inc. and Zenith Radio Corporation.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago, Illinois 60604.

Tuesday, January 23, 1968.

Before

Hon. John S. Hastings, Chief Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Latham Castle, Circuit Judge.
Hon. Roger J. Kiley, Circuit Judge.
Hon. Luther M. Swygert, Circuit Judge.
Hon. Thomas E. Fairchild, Circuit Judge.
Hon. Walter J. Cummings, Circuit Judge.

HAZELTINE RESEARCH, INC.,
Plaintiff and Counter Defendant-Appellant,
Nos. 15246, 15563
vs.
ZENITH RADIO CORPORATION,
Defendant and Counter Claimant-Appellee;

HAZELTINE CORPORATION,
Appellant,
Nos. 15247, 15564
vs.
ZENITH RADIO CORPORATION,
Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for rehearing or reconsideration by the court of appeals *en banc*, filed by Zenith Radio Corporation in the above causes, be, and the same is hereby, denied.

(Judge Fairchild voted for rehearing *en banc* "limited, however, to the issue of whether or not paragraph c should be stricken from the injunction.")